

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

ORIGINAL

77-6049

To be argued by
IRVING LIKE

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-6049

COUNTY OF SUFFOLK, COUNTY OF NASSAU, TOWN OF
ISLIP, TOWN OF HEMPSTEAD, TOWN OF NORTH HEMP-
STEAD, TOWN OF OYSTER BAY, TOWN OF HUNTING-
TON, and the BOARD OF TRUSTEES OF THE TOWN OF
HUNTINGTON and CONCERNED CITIZENS OF MONTAUK,
INC.,

Appellees,

against

SECRETARY OF THE INTERIOR, et al.,

Appellants,

NATIONAL OCEAN INDUSTRIES ASSOCIATION, et al.,
and NEW YORK GAS GROUP,

Intervenor-Appellants.

THE NATURAL RESOURCES DEFENSE COUNCIL, INC.,

Appellees,

against

THOMAS S. KLEPPE, Secretary of the Interior,

Appellant,

NATIONAL OCEAN INDUSTRIES ASSOCIATION, et al.,

Intervenor-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF OF PLAINTIFF-APPELLEE
COUNTY OF SUFFOLK

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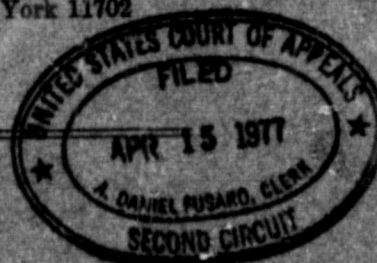


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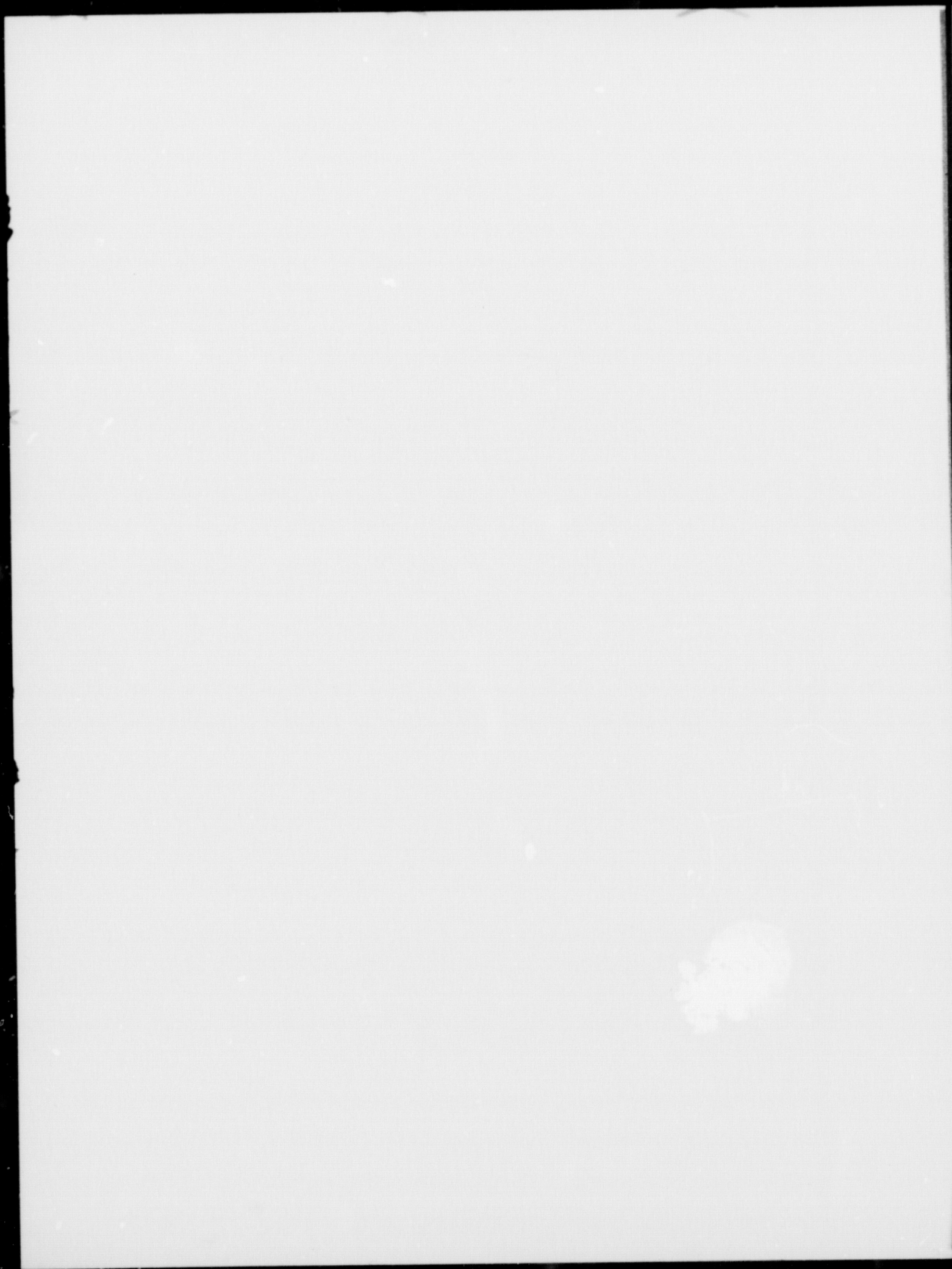
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BRIEF OF PLAINTIFF-APPELLEE COUNTY OF SUFFOLK

Introduction

The District Court invalidated the Secretary of Interior's decision to hold lease Sale 40 on the grounds that the Secretary: 1) ignored the practical effects of local governmental licensing, permitting and review powers in the NEPA documents; 2) failed to consider the environmental impact of specific probable pipeline routes from the outer continental shelf, in spite of the fact that projection of such routes is routinely made by industry and could have been made by industry and could have been made by the Secretary or his agents; 3) greatly overstated peak oil and gas production for Sale 40 and significantly understated the cost of such production, including pipeline construction; this resulted in a serious lack of consideration of the likelihood and attendant dangers of increased tanker traffic and an overestimate of the net value of the entire project; 4) failed to consider the possible impact of particular tract selection choices on the feasibility and sites of pipelines; there was no consideration of the alternatives of either excluding industry-preferred tracts, or including less highly desired tracts in the final sale offer because of related onshore impacts and developments; and 5) failed to consider the alternative of separating exploration from production leasing. (District Court Opinion, 7, 8) (Hereinafter Op.) (JA 29, 30).

There is a persistent theme in the briefs of appellants and their *amici* supporters that the District Court's holding in this case will obstruct steps to develop new energy sources or will exacerbate the so-called "energy crisis" that, they allege, this country has been experiencing. This is untrue. Judge Weinstein decided, on the basis of an evidentiary record unprecedented for its comprehensiveness and quality, that the Secretary, by reason of his gross violations of NEPA, bordering on irresponsibility and bad

faith, did not make an informed and reasoned decision to lease the Sale 40 lands. Had he made such a reasoned judgment in compliance with NEPA standards, he might have determined that the net value of the Sale 40 project was insufficient to justify proceeding with the lease sale and that there were alternatives preferable to the development of OCS Sale 40 lands, alternatives or options deserving higher priority, which would produce the needed oil and gas more quickly, with less environmental damage and at less cost to the consumer. Thus, Judge Weinstein's decision has not exacerbated the energy crisis. Instead, the real effect and value of his decision is to hold the Secretary to his obligation to properly perform his responsibilities under NEPA as fiduciary of the public lands, thereby providing greater assurance that he will make a reasoned judgment best calculated to serve the public interest in gaining additional energy supplies.

The Court below decided the instant case on the basis of an extraordinarily comprehensive evidentiary presentation which culminated in an unprecedented fact-intensive record. Unprecedented because in no prior OCS case was there such a broad scope of issues litigated so extensively on the basis of live, intensely cross-examined *oral* testimony by outstanding experts in the fields relevant to OCS technology and its environmental and socio-economic assessment. In no other OCS case was there so comprehensive a set of pleadings or such extensive discovery proceedings, including interrogatories and oral depositions of the government officials who participated in the decision making process.

Through the use of discovery, plaintiff-appellees flushed out the decision documents on which the Secretary actually relied in reaching his decision to hold lease Sale 40, and traced the historical events which preceded the lease sale.

Justice Oliver Wendell Holmes' observation that "a page of history is worth a volume of logic" is particularly appropriate. The historical evidence bore on the issue of

the Secretary's lack of good faith. It prompted the trial court to say that a strong demonstration had been made that the NEPA documents and public hearings were but a charade, and that the decision to hold lease Sale 40 was a foregone conclusion and had been made long before the ostensible decision dates and before fulfillment of NEPA's requirements, and that the BLM simply went through the NEPA motions in order to validate the decisions previously made. (Op. 75, 76) (JA 98, 99).

Although the court below declined to base its decision that NEPA had been violated on these grounds, the strong circumstantial evidence of the Secretary's lack of good faith helps substantiate the inadequacy of his review of the NEPA questions, and markedly distinguishes this case on its facts from the other OCS cases cited by Appellants.

In this brief we will first answer, one by one, the Appellants' attacks on the District Court's findings of NEPA violations. At the conclusion of the brief, we will distinguish each of the OCS cases upon which Appellants rely throughout their briefs, and will demonstrate that none approaches the scope or "fact-intensiveness" of the record in the case at bar.

Issues Presented for Review

1. Does the environmental impact statement prepared by Interior for the oil and gas lease sale 40 satisfy the requirements of NEPA?
2. Was it proper for the District Court to conclude that the Secretary's decision to conduct the lease sale was arbitrary and capricious?
3. Was it proper for the District Court to have nullified the sale 40 leases and to have enjoined the appellants from further proceeding with the exercise of any powers purportedly granted by such leases?

I. District Court Findings

A. Failure to Consider Impact of State and Local Exercise of Regulatory Powers.

In its opinion, the Court below set forth a series of fact-intensive findings concerning the tanker-pipeline issue, its relationship to state and local exercise of regulatory powers, and the consequences of the Secretary's failure to consider the site-specific practical effect of the exercise of such powers. (Op. 9-43) (JA 31-65).

NOIA's Argument

The Court below erred in holding Sale 40 EIS inadequate because it failed to:

- (a) *Pinpoint* location for pipeline landfalls;
- (b) Identify and analyze municipal and county land use regulations in the Mid-Atlantic area; and
- (c) Speculate about future political opposition to on-shore OCS facilities.

(NOIA's Brief, 23-27; see also *Federal Appellants' Brief*, 23-24).

Answer

The District Court faulted the Secretary:

- (a) Not for failing to pinpoint exact pipeline locations, but for failing to describe likely oil and gas delivery routes (Op. 19) (JA 41) and to consider the environmental site specific *impacts* of specific probable or likely pipeline routes although projection of such routes is routinely made by industry and could have been made by the Secretary or his agents (Op. 7, 24-29) (JA 29, 46-51). NOIA's own witness, Brunjes of Shell Oil Company, testified that experienced persons in industry or government were able to predict fairly closely the landing sites and best routes to Philadelphia, and could line out the most suitable tracts (Op. 36) (JA 58). As a result, the Secretary failed

to consider potential adverse effects of such pipelines, and failed to inform decision makers of the alternative modes and routes of transport of Sale 40 oil and gas so as to enable government decision makers to understand and plan to cope with the impacts of reasonably defined tanker-pipeline options in their zoning land use and CZM planning processes (Op. 35, 36) (JA 57, 58).

(b) Not for failing to identify and analyze local relations but for listing such powers in abstract form (Op. 15) (JA 37) and ignoring the *practical effects* of local governmental actions (Op. 7) (JA 29), failing to project the site-specific, pragmatic effects of the likely exercise of such power (Op. 19) (JA 41), failing to analyze specific impacts on the Sale 40 area (Op. 21, 23) (JA 43, 45), and for not considering the need for coordination of zoning and other actions required for reasonable exploitation of the potential oil and gas production resource (Op. 11) (JA 33).

(c) Not for failing to *speculate* about future political opposition to onshore OCS facilities, but for failure to evaluate local opposition to pipelines or tanker-related onshore facilities and for failure to evaluate evidence which would have been brought to the Secretary's attention by the NEPA documents that local governmental powers can and will be utilized to prevent tanker and pipeline landing of OCS oil over wide portions of the coast line (Op. 14) (JA 36). It was possible for the Secretary to engage in an economic assessment of the effects of local opposition to pipelines (Op. 42) (JA 64). However, the Secretary inadequately addressed the economic aspect of the exercise by state and local governments of their powers to prohibit or restrict onshore facilities. Consequently, he did not properly assess the potential costs to the OCS program resulting from the exercise of such controls and hence he could not assess, weigh and balance the relative costs and benefits of the proposed OCS program, as required by NEPA (Op. 37) (JA 59), and furthermore, he could not assess fairly the economic feasibility of pipelines as against tankers (Op. 42) (JA 64).

Tanker-Pipeline Issue

The District Court, in its opinion granting plaintiffs' (appellees' herein) motion for preliminary injunction, ruled there that the Secretary's decision to hold lease Sale 40 was based on an insufficient analysis of environmental dangers, in that it inadequately covered the impact of possible State decisions affecting such matters as where pipelines or tankers will need to be used, and where on-shore facilities can be located. (District Court Preliminary Opinion, 19) (JA 174) (Hereinafter P. Op.). The Court noted that if the states bordering the Sale 40 area prevented pipelines from OCS drilling sites from crossing their shores (as states have the power to do), then a natural alternative for transporting oil would be by tankers, and that such a state decision banning pipelines is not inconceivable. (P. Op. 55) (JA 211).

The Court found that the Final EIS Sale 40 contained no discussion and, apparently, no real awareness of the fact that state laws may severely restrict pipelines and related onshore facilities. (P. Op. 62, 63) (JA 217, 218).

The Court concluded that without an analysis of these state provisions and the probable extent of state cooperation or opposition, a realistic appraisal of the impact of Sale 40 on the environment is not possible. (P. Op. 66) (JA 221).

The Court also noted that the Sale 40 PDOD makes a firm assumption that pipelines will be used (P. Op. 60) (JA 215) and that the Programmatic PDOD assumes the use of pipelines as both economically and technically feasible in case of a large oil discovery. (P. Op. 61, 62) (JA 216, 217).

The Court concluded that if the assumption by the Secretary that pipelines will transport the oil in case of a large strike would have been different had the state situation been brought home to him, then the entire NEPA decision making process is invalid.

"Misplaced reliance on such a material proposition raises a question as to the adequacy of the NEPA

documents and the reliability of the Secretary's decision." (P. Op. 67) (JA 222).

Evidence developed at the final hearing provides additional support for the Court's earlier findings which it reaffirmed in its second opinion.

Inadequate Assessment Tanker Spills

The more severe environmental dimensions of the tanker/pipeline issue and its nexus with Long Island were traced by planner, DeWitt Davies of the Nassau-Suffolk Regional Planning Board. He produced maps showing the location of the OCS Sale 40 tracts in relation to tanker shipping lanes, oil spill, trajectory probability contours and the resources of the N.Y. Coastal Zone, (Exs. T-231, 233, 234, 236, 237). These maps, viewed together with the earlier fisheries maps prepared by Professor McHugh (Exs. 22-46), document the distribution of the fisheries from the shelf to the coastal zone and, in particular, the unusually high productivity of the area surrounding Long Island with respect to fish, shellfish and water fowl, and recreation areas (JA 1380).

The maps graphically revealed the convergence of three tanker shipping lanes to the apex of the N.Y. Bight and Harbor Area, and the marine resources that would be specifically impacted if a tanker spill occurred in the close by shipping lanes which would be used by tankers transporting oil from the Sale 40 area (JA 1387).

Davies described the heavy existing tanker traffic in the N.Y. area and testified that if no pipelines were constructed, an additional oil tanker transporting oil from the OCS Sale 40 area would come into the N.Y. Port each day (JA 1382-1384, 1387).

Based on oil spill trajectory studies, Davies established that a spill occurring in a tanker shipping lane transporting oil from the Sale 40 area to the N.Y. Harbor had a 40%-60% probability of reaching the shore of Long Island in the summertime (JA 1372, 1373) and a 33% to 67% probability in the wintertime, and the probability of

stranding of an oil spill increased as tankers approached the N.Y. Harbor (JA 1363-1369, 1372, 1373, 1376) (Exs. T-233, T-234).

Davies found that the FES Sale 40 was inadequate to a decision maker in its assessment of tanker spills. It did not contain any oil spill trajectory studies analyzing tanker spills in the shipping lanes converging on the N.Y. Harbor area (JA 1428). It did not evaluate the possible increase of tanker traffic associated with Sale 40 (JA 1409, 1410). The oil spill trajectory studies contained in the impact statement concentrated on spills originating at the site of the proposed Sale 40 and did not evaluate spills originating in the tanker lanes south of Long Island (JA 1428). Assuming that the states and localities refuse to accept any pipelines along their shores, and assuming that all of Sale 40 oil may be tankered ashore, a reasonably well informed public decision maker, reading and using admittedly deficient methodology (JA 1410, 1411, 1416), cannot from the FES determine how total tankering of that Sale 40 oil will impact tanker traffic into New York (JA 1415). The oil spill trajectory studies in the FES do not in any way show the pattern of spill possibilities from tanker lanes off New Jersey (JA 1430), which might result from the additional tankers transporting Sale 40 oil to the Philadelphia refinery complex (JA 1387).

The impact on the tankers/pipeline issue of the exercise of power by other federal agencies also becomes quite apparent from the disclosure in the Shell study that recent EPA decisions might exclude pipelines from crossing the New Jersey coast, and force a longer pipeline route with a shore approach pipeline landing location in Delaware, with the magnitude of additional pipeline cost rendered uncertain due to the anticipated considerable local opposition from oyster bed economic interests (JA 1789).

Inadequate Assessment of Pipeline Impacts

As was noted above, it is clear from Brunjes' testimony that the Secretary failed to adequately assess the pipeline landing sites and best routes to Philadelphia for OCS Sale

40 oil. Based on the data and expertise available to the Secretary, it was clear, at the time FES Sale 40 was issued, that experienced people would tend to line out and identify the most suitable tracts without too much effort, and would have come to roughly the same conclusion as Shell did, with respect to the landing sites and best routes to Philadelphia (JA 1825, 1826, 1828). The District Court stressed that Brunjes' testimony established beyond question that the economic implications of local opposition to pipelines could have been ascertained by the Secretary but that they were not.

"This evidence [of Brunjes] establishes that it was quite possible for the Secretary to engage in an economic assessment of the effects of local opposition to pipelines. It was also reasonably necessary in order for the Secretary to know the realistic costs of the proposed action as compared to the benefits, and in order to assess fairly the economic feasibility of pipelines as against tankers. Without this information, the Secretary could not make a reasoned decision as to the potential costs to be incurred by the proposed program.

Where, as here, information was available to the government and meaningful analysis was reasonably possible on issues of such environmental significance, the Interior Department was under a NEPA-imposed obligation to disclose the information and undertake the analysis. The conclusion is inescapable that if, in their own economic interest oil companies can project, examine and analyze fairly detailed pipeline corridors, the Secretary of the Interior, in the critical public interest of environmental protection, must do so as well." (Op. at 42, 43) (JA 64, 65).

Thus the NEPA documents lacked an assessment of the potential environmental and socio-economic impact of such probable pipeline landing sites and best routes to Philadelphia.

This violation of NEPA was exacerbated by the Secretary's failure to adopt any standards for making an evaluation of when pipelines are deemed to be economically feasible and by his failure to adequately discuss in the FES Sale 40, the economic considerations and trade-offs involved in deciding the tanker/pipeline issue.

Davies and Brunjes gave concrete, real world dimensions of the relationship of the power of state and local entities to bar pipelines to the tanker/pipeline issue, and proved without contradiction, that the NEPA documents were grossly inadequate to: (1) meaningfully inform federal, state and local decision makers and the public, of the alternative mode and routes of transport of Sale 40 oil and gas; and (2) enable such decision makers to understand and plan to cope with the impacts of reasonably defined tanker/pipeline options in their zoning, land use and coastal zone management planning processes.

B. Effect of Coastal Zone Management Plans.

States and localities will not be able to protect their coastal areas and environment from the effects of an incomplete impact statement by developing coastal zone management plans in accordance with the Federal Coastal Zone Management Act, 16 U.S.C. §§ 1451 *et seq.* (CZMA), using funds from the federal government because: 1) NEPA requires an independent assessment of a variety of facts to determine possible environmental damage, and these inputs are essential to effective CZM planning; 2) the extensive work being done on the various state plans will not be completed until 1978 at the earliest; and 3) the critical amendments to the CZMA relied upon by defendants were adopted *after* the Final Environmental Sale 40 was published and the Secretary of Interior made his decision to lease; these amendments could have had no impact on his decisions under NEPA. (Op. 13) (JA 35).

NOIA's and Federal Appellants' Argument

The OCS management system and the Coastal Zone Management Act (CZMA) will resolve all issues concerning pipelines and the siting of other coast energy facilities, enable coastal zone governments to anticipate, manage and cope with the impacts from such facilities, and insure that OCS development will be consistent with approved CZM plans. (*NOIA's brief*, 24-32; *Federal Appellants' Brief*, 35-37).

Answer

The District Court found substantial evidence in the record indicating that local governmental entities can and will act to prevent the landing of OSC oil, whether that landing is accomplished by tanker or pipeline. The failure of the Secretary to evaluate such local opposition, the court concluded, resulted in "... a failure to gain a full and meaningful perspective on the intrinsic environmental problems related to offshore oil and gas exploration." (Op. 14, 15) (JA 36, 37).

OCS Management System Inconsistent and Not Coordinated with CZM Planning

Underlying the Court's findings on this issue, which it later develops in its opinion, is the realization that the failure of the Secretary to evaluate the alternative of separating exploration and production precluded the most rational sequence for achieving consistency between OSC development and CZM planning. For after the results of exploration are in, the size of potential reserves can be verified, and the economic considerations affecting the use of pipelines vs. tankers better analyzed. After the tanker/pipeline issue is resolved, CZM planning could be permitted to be completed before development and production plans are submitted and such activities begin. In this way, the OCS lessees' development and production plans could be reviewed to determine if they are consistent with the CZM plans, which define what areas may or may not be used for pipelines and other coastal energy facilities.

If the separation alternative is not evaluated, and if exploration is not separated from development and produc-

tion so as to provide the essential inputs to CZM planning, the CZM requirement of consistency may be thwarted. The OCS management system described in Federal Appellants' briefs does not compel OCS lessees to adjust the timing and content of their development plans so as to await and conform with approved CZM plans. On the contrary, it forces coastal states to adjust to the petroleum industry lessees' timing of development plans and shape their CZM plans to accommodate industry plans. In short, instead of the oil industry awaiting and conforming with CZM plans, it is the coastal states who must time and conform their CZM plans to the industry's plan of development. Nothing in the operating orders, regulations, or lease stipulations requires the lessees to defer their development plans and production activities until after CZM plans have been approved and conformity established.

For example, proposed OCS order #15 (cited at *Federal Appellants' Brief*, 14-15) requires OCS lessees to submit information to the affected coastal states concerning possible on-shore development, at least 30 days prior to submission of development plans for approval by the Geological Survey (GS). The information includes location, size of any offshore and land based facilities, means and routes to be used to transport oil and gas to shore, and amount of oil and gas to be transported. The GS must then consider state comments before approving the development plans.

On its face, this proposed operating order betrays the lack of coordination between the OCS management system and CZM planning.

The OCS lessee cannot prepare a detailed development plan and the coastal state cannot effectively complete its CZM planning until the results of exploration are reviewed. Once the exploration phase is completed, the lessee can immediately, subject only to 30 days prior notice to affected coastal states, submit a development plan to the GS showing the location of proposed pipeline routes, landfalls and other onshore coastal energy facilities. However, at this point the coastal states, not being able to act as

quickly as the lessees, will not yet have adequate opportunity to evaluate the exploratory data and to complete their CZM plans.

Consequently the coastal states will be confronted with the necessity of commenting on the lessees' development phase before the CZM planning is completed, and the coastal governments will thus be deprived of the opportunity to determine whether the lessees' development plans are consistent with previously approved CZM plans.

In short, under the present OCS management scheme, the OCS lessees can because of their control of the exploration stage and the timing of exploratory data disclosure, and submission of development plans, escape the consistency requirement of the CZM.

It is thus clear that the disadvantage to affected coastal states caused by the failure of the FES to define probable pipeline routes cannot be remedied by the CZM framework, absent an appropriate separation of exploration and development. Moreover, as we discuss later in this brief, GS is also disabled from effectively evaluating the lessees' development plan because of the inadequacy of the BLM environmental studies program. (See *Brief, infra*, at 50-52).

Finally, as the District Court noted in its discussion of the need for a coordinating agency to integrate governmental and industry planning so as to minimize adverse environmental impacts, there is no consolidation of responsibility for the outer continental shelf program in one agency. This fragmentation of authority further undercuts Appellants' claim that existing programs will provide the coastal states with the inputs they need to assess onshore impacts. The District Court said:

" . . . State and local planners seeking either to obtain information concerning activities related to the outer continental shelf, or to convey their own data or concerns to federal decisionmakers are confronted by an overwhelming conglomerate of government and pri-

vate agencies involved in various ways in the leasing, exploration and production processes.

Despite the urgency which past administrations have attached to expanding offshore lease sales and petroleum production, no consolidation of responsibility for the outer continental shelf program in one agency has occurred. There is thus, apparently, no effective top level coordination of outer continental shelf management, practices and studies.

Individuals and municipalities concerned about, or involved in, environmental planning may be caught up in the ensnarled attempts of these and other departments and agencies to protect and enlarge their own bureaucratic functions. See generally, *Coastal Effects of Offshore Energy Systems*, pp. 43-50, 124-140." (Op. 84, 85, 86) (JA 107, 108, 109).

C. Defective Cost/Benefit Analysis.

The District Court found that the Secretary seriously underestimated the finding costs, pipeline construction costs and total estimate required for Sale 40, and seriously overestimated peak levels of oil and gas production. (Op. 43-56) (JA 65-78).

NOIA's and Federal Appellants' Argument

Both the Federal Appellant and NOIA criticize Mr. Donkin's testimony and exhibits which compared the Interior Department's estimates for the investment required to develop oil and gas resources at the Sale 40 acreage against estimates based upon the unit finding costs for both crude oil and natural gas. They focus their attack upon Mr. Donkin's inclusion of exploratory overhead in his estimates, which they assert is not the kind of capital investment included in the PDOD. Appellants also argue that Mr. Donkin erred by failing to recognize that the investment costs in the PDOD did not include wages paid for labor in exploratory drilling (*NOIA's Brief*, 57, 58; *Federal Appellants' Brief*, 50).

Answer***The Secretary's Gross Underestimate of Sale 40
Investment Costs***

Both the Federal Appellant and NOIA totally ignore Mr. Donkin's testimony that exploratory overhead "*should be covered by the finding cost of the commodity*" (Tr. 1163) (JA 1887) and that "the FPC treats (exploratory overhead) as investment" in developing its finding costs estimates (JA 1890-1891). The fact is corroborated by the definition of exploratory overhead, which is:

all general operating and administrative expenditures above the field level, which are applicable to exploration . . . activities, excluding only those items which have been directly classified under Items B-1-g, B-2-d, and B-3-a. Include salaries and office expenditures and *depreciation charges* for office buildings, etc.*

Clearly, any cost which may be depreciated represents a capital investment.

Even granting, *arguendo*, that exploratory overhead is not an "investment", the effect upon removing this item from Mr. Donkin's finding cost estimates is *de minimis*. This is because exploration overhead only accounts for 4.9 percent of the new crude oil costs and 12.6 percent of the new, non-associated natural gas costs used by Mr. Donkin. Thus, for example, in the high reserves case, if exploratory overhead is ignored, Mr. Donkin's estimated finding costs would still exceed the Interior Department's estimate by \$3.046 billion (or by 115 percent), if the crude oil finding costs are used; or by \$1.44 billion (or by 54.7 percent), if the finding costs for non-associated natural gas are used.

* *Joint Association Survey of the U.S. Oil & Gas Producing Industry*, sponsored by the American Petroleum Institute, Independent Petroleum Association of America, and Mid-Continent Oil & Gas Association (February 1975). This publication represents the data source used by the FPC in its finding cost methodology.

NOIA'S assertion that Mr. Donkin erred in his treatment of investment costs associated with exploratory drilling is totally without merit and a misrepresentation of the data contained in Table III-31 of Volume II of the FEIS (p. 223). To illustrate, NOIA asserts that the FEIS estimate of labor costs per rig are not included in the investment costs per exploratory well. This simply is not the case. Table III-31 of the FEIS clearly shows that the two figures are *not mutually exclusive* and that the estimated exploratory costs of \$3,000,000 per well is derived from the assumption that wages paid for exploratory drilling will be \$1,500,900 per year per exploratory drilling rig. Moreover, Mr. Donkin testified that the labor associated with exploratory drilling *should be* included as part of the investment costs listed in Table 3 of the PDOD and that all costs associated with drilling exploratory and developmental wells are capital costs (JA 1882).

Both NOIA and the Federal Appellant have seemingly missed the thrust of Mr. Donkin's testimony on this subject. Simply stated, Mr. Donkin's unfuted position is that the Interior Department's PDOD erred significantly by indicating to the Secretary that, for example, in the high reserves case, a total investment of only \$3,338,800,000 would be required to find, transport and process 1.4 billion barrels of oil and 9.4 trillion cubic feet of gas. Moreover, Mr. Donkin testified that the major causes of this understatement are:

- (1) The Interior Department underestimated the costs of a large diameter offshore pipeline by approximately \$700,000 per mile (Ex. T-250) (JA 3051); and
- (2) The Interior Department understated the number of wells required to produce the oil and gas reserves estimate by between 400 and 700 wells (JA 1884).

The fact that the Interior Department substantially understated the number of oil and gas wells, and therefore

the finding costs, for the Sale 40 acreage is supported by the following data:

Drilling Results In the Offshore Areas of
Louisiana and Texas (1971-1974)*

<i>Year</i>	<i>Total Wells Drilled</i>	<i>Dry Holes</i>	<i>Successful Wells</i>	<i>Success Ratio</i>
1971	827	376	451	54.5%
1972	946	427	519	54.9%
1973	839	399	440	52.4%
1974	746	406	340	45.6%
1971-1974	3,358	1,608	1,750	52.1%

These statistics show that only 52.1% of the wells drilled in the Gulf of Mexico during the period 1971-1974 were successful. This experience is contrasted with the Interior Department's estimates for the Sale 40 acreage, which are as follows:

Number of Wells Required to Develop Hydrocarbon
Resources Within the Sale 40 Acreage**

<i>Reserves Cases</i>	<i>Total Wells Drilled</i>	<i>Exploratory Wells</i>	<i>Producing Wells</i>	<i>Success Ratio</i>
Low	260	60	200	76.9%
High	1,040	240	800	76.9%

These data, when compared against actual offshore experience in the Gulf of Mexico, clearly demonstrate that the Interior Department's estimates for the number of wells required to develop oil and gas from the Sale 40 acreage are in error. Moreover, if the observed success ratio from the Gulf of Mexico drilling experience is applied to the Interior Department's estimated number of producing wells, then 384 wells (as opposed to 260) will be

* *Joint Association Survey of the U.S. Oil & Gas Producing Industry.*

** Program Decision Option Document, Sale #40 Mid-Atlantic OCS, Appendix, Table I.

required in the low reserves case and 1,536 wells (as opposed to 1,060) will be required in the high reserves case.*

Federal Appellants' Argument

The Federal Appellant asserts that Mr. Donkin's comparison of the High Island Offshore System (HIOS) costs with the Interior Department's Offshore pipeline costs, is invalid because the HIOS system is not a "field-to-shore" pipeline and it is "exclusively between one offshore area of a producing field and another area of that field". Appellant also argues that the testimony of Franklin Brunjes corroborated the Secretary's \$1 million per mile figure. (*Federal Appellants' Brief*, 51).

Answer

The Secretary's Gross Understatement of Sale 40 Pipeline Costs

Mr. Donkin testified that, in fact, the HIOS system is not a gathering line, which collects gas totally within a field; that it is a 203.5 mile mainline pipeline system which will ultimately transport gas from several offshore discovery areas to shore; and that an additional 42 inch pipeline will transport the gas from Block A-167 to shore (Tr. 1135-1136) (JA 1877-1878).

In this connection, the distance from Block A-167 to shore is 29.8 miles. This 42 inch pipeline will be owned by the U-T Offshore System Company and the estimated cost of this pipeline is \$49,125,000, or \$1,648,456 per mile.**

* Interestingly, Mr. Donkin testified that as many as 1,500 producing wells may be needed to develop the oil and gas reserves in the high reserves case (Tr. 1160) (JA 1884). If that is so, then well over 2,000 total wells (including dry holes) would be necessary if the high reserves estimates were to obtain.

** The U-T Offshore System is jointly owned by affiliates of United Gas Pipeline Company, Transcontinental Gas Pipeline Corp., and Natural Gas Pipeline Company of America. The cost figures for the U-T Offshore System were taken from the application for a Certificate of Public Convenience and Necessity, FPC Docket No. CP-76-118, filed on October 6, 1975.

Thus, if this cost (and mileage) is added to the costs associated with the HIOS pipeline, then the total cost of the combined systems from the producing fields to shore is \$1,722,462 per mile, or less than 1 percent below the figure of \$1,733,229 per mile used by Mr. Donkin in his testimony. Thus, Mr. Donkin's offshore pipeline cost comparison is valid, as is his conclusion that the Interior Department significantly underestimated large diameter offshore pipeline costs.*

The Shell Pipeline Cost Study

It is also clear from Brunjes' testimony that his pipeline cost figures do not confirm the figures used by the Secretary. First, Brunjes admitted that his study of the economics and feasibility of transportation of crude oil produced from the Sale 40 area to existing on-shore refineries was "... a 'desk study' in nature since all concepts, assumptions and estimates are based solely on information gathered from available maps of the area." (JA 1804-1805).**

Moreover, Brunjes testified that the decision on tankers or pipelines would require further work and detailed

* It may be the case that in prior years, an offshore pipeline cost estimate of \$1 million per mile would have been reasonably accurate. However, by late 1975, the effective date of the cost estimate adopted by Mr. Donkin, that figure had become out of date. Moreover, during the course of cross examination, Donkin, when challenged by counsel for the Federal Appellant on the basis of his pipeline cost estimate, referred to an industry trade journal which stated that the indicated increase in the cost of offshore pipeline construction has been almost at 150% over the period 1973-1976.

** This is in marked contrast to Donkin's testimony and exhibit on pipeline costs, which reflect the actual cost to be incurred in constructing a large diameter offshore pipeline in water depths approximating the anticipated water depths for the "Mid-Atlantic" sale area (Tr. 1104). Moreover, unlike Mr. Brunjes' opinion, Donkin's testimony was based on an extensive study which identifies, in detail, all significant offshore pipeline costs by individual cost components. It is therefore clear that the factual basis for Donkin's pipeline costs estimate is far superior to that of Mr. Brunjes.

studies on cost factors (JA 1786) including on-site investigation (JA 1790), consideration of investment risk and cost of money (JA 1782, 1787-1800), possibility of mix of pipelines, tankers and barges during life of field (JA 1784, 1818, 1819), cost of complying with pollution reliability and other regulatory requirements (JA 1801-1812), sea bottom routing and cost of installation of offshore pipelines (JA 1815), particular terrain, legal and construction problems incident to land pipeline routes, cost of compliance with Coastal Zone Management Plan requirements (JA 1817), estimates of future tanker costs, idle tanker capacity, supply/demand relationship of tankers and charter rates (JA 1820), use by Sale 40 lessees, such as Exxon, of their own tanker fleets (JA 1821-1822), and outcome of pending FTC proceedings against major oil companies (JA 1823). These additional factors, as well as the variables and uncertainties described in the OTA reports (Pl. Exs. 201, 218(a)), add substantially to Brunjes' estimation of the cost of pipelines and confirm the accuracy of the Donkin figures, not those of the Secretary.

In short, as demonstrated by the testimony of Donkin and Brunjes, the Secretary made serious errors in his cost/benefit analysis of Sale 40, by overstating the amount of its oil and gas production, and understating the cost of offshore pipelines, thus resulting in a misleading treatment of the tanker/pipeline issue. While the NEPA documents assert the probability that pipelines will be used, the significant errors in the cost/benefit analysis not disclosed in the FES Sale 40 tilt the balance away from pipelines and toward tankers, thus escalating the risk of oil spills and the severity of potential adverse environmental impact.

Federal Appellants' Argument

The Federal Appellant is critical of Mr. Donkin's testimony dealing with the timetable of development and the level of oil and gas resources required if that development schedule is to be met. In particular, the Federal Appellant argues that Mr. Donkin erred in his assumption of

particular production decline schedules and that the Secretary's estimates are correct, inasmuch as he assumed a field life of 25 years, as opposed to Mr. Donkin's assumption of a 30 year field life (*Federal Appellants' Brief*, 51-52).

Answer

The Secretary's Gross Overstatement of Sale 40 Oil & Gas Reserves & Production

The production decline schedule for crude oil used by Mr. Donkin assumes a life-of-reserves of 27.08 years* as compared to the 30-year life asserted by the Federal Appellant. By altering the assumption as to field life or life of reserves to 25 years, the effect on Mr. Donkin's testimony is *de minimis*. In fact, it is highly possible that, depending upon the rate of production decline assumed, more crude oil reserves, not less, would be required if the Interior Department's production schedule for the Sale 40 acreage is to be realized. In short, the Federal Appellant's argument concerning the relationship is a *non sequitur*.

More importantly, the Federal Appellant's criticisms of Mr. Donkin's testimony on this subject relate solely to his treatment of the oil production schedule and they completely ignore his testimony dealing with the inaccuracies in the Interior Department's natural gas production schedule. As is evident in Exhibit T-250 (JA 3056-59), the extent of error in the Interior Department's natural gas production schedules is far greater than the error associated with the crude oil production timetable in the PDOD. Although he was cross-examined at length on this subject, Mr. Donkin's unrefuted testimony remains that regardless of the production decline assumption adopted, "there is no way that you can produce 3,080,000 Mcf per day in 1989 if you are going to produce a billion cubic feet a day in

* "Calculation of New Oil Costs, United States, Years 1959 through 1974". Lar Rue, Moore & Shaefer; Petroleum Consultants; Dallas, Texas; Table 26 (May 1, 1975).

1985 and 240,000 Mcf per day in 1983, etc." from a reserve of 9.4 trillion cubic feet of gas (JA 1897).

To illustrate this point more clearly, Appendix "A" contains computer estimates of the gas reserves required to meet the Interior Department's production schedule under five alternative production schedules. Those estimates indicate that, as opposed to the Interior Department's assumed gas reserves of 9.4 trillion cubic feet for the Sale 40 acreage, between 13.99 and 15.38 trillion cubic feet of gas reserves must underlie the Sale 40 leases if the assumed production schedule is to be met. Thus, Mr. Donkin did not testify, for example, that it is not possible that 1.4 billion barrels of oil and 9.4 trillion cubic feet of gas will be found at the Sale 40 acreage. Rather, the substance of Mr. Donkin's testimony on this topic was that the *probability* (a statistic not presented in the administrative record) that those levels of oil and gas reserves will be found at these leases is extremely low. In particular, Mr. Donkin testified that, according to the U.S. Geological Survey's Circular 725, there is "less than a fifty percent chance that the entire (offshore Atlantic) area from Georges Bank down to offshore Florida would contain the high natural gas reserves estimate used by the Interior Department in the PDOD for Sale 40" (JA 1862J-1862K). In other words, the chance that the Interior Department's high reserves estimates for the Sale 40 leases will be met is much closer to zero percent than it is to the 48 percent probability contained in Circular 725.

NOIA's Argument

The Secretary should not be faulted for the errors in his cost/benefit analysis testified to by Donkin, because the ability to make such forecasts for complex systems is more a guess and less a prediction. (NOIA's Brief, 60, citing *Sierra Club v. Morton*, ("MAFLA"), 510 F.2d 813, 827 (5th Cir. 1975)).

Answer

The excerpted portion from *Sierra Club v. Morton* relied on by NOIA is not applicable. NEPA, S. 102(2)(c) (iv), in the context of the cited case, was held not to require a dollar and cents weighing of the costs and benefits of the relationship between local short term uses of man's environment and enhancement of long term productivity.

A similar challenge was not made to the MAFLA cost/benefit analysis, and the MAFLA EIS did not estimate peak oil and gas production from MAFLA, and did not estimate the cost of such production, including MAFLA pipelines. MAFLA dealt only with Plaintiff's argument that the Secretary should have quantified and assigned dollar values to future environmental effects of MAFLA. *Sierra Club v. Morton*, *supra*, 510 F.2d at 827.

The Court said this was not the *sine qua non* for the MAFLA EIS (*Id.*).

However, its language is not applicable to the Sale 40 EIS discussion of cost/benefit. In the instant case, the Secretary represented explicitly in his NEPA documents the costs of developing OCS Sale 40 and its estimated reserves and production rates. The Secretary advanced this information as justification for his decision to hold lease Sale 40. Thus the accuracy of the Secretary's figures was open to challenge. If the Secretary seriously erred, as Donkin proved he did, the Secretary's cost/benefit analysis was defective within the meaning of NEPA.

Environmental & Socio-Economic Consequences of Defective Cost-Benefit Analysis

The District Court properly recognized that the Secretary's cost/benefit analysis is the underpinning of and is vitally linked to all of the NEPA issues, including his duty under NEPA to compare the proposed OCS Sale 40 to its alternatives and to weigh the latter and their environmental and socio-economic effects.

"In balancing the projected benefits of Lease Sale 40 against its potential adverse environmental impact and

against alternative energy producing programs, and in order to arrive at a reasoned decision on whether to proceed, it was essential for the Secretary to make a realistic estimate of the investment costs necessary to produce a given quantity of energy. Critical components of that factor are the estimated quantities of oil and gas reserves, expected peak production levels, and the cost of pipeline construction. This last item has exceptional significance, in light of the Secretary's firm assumption that pipelines, rather than tankers, would be the actual mode of transport." (Op. 43-44) (JA 65, 66).

The Court also stated that:

"If the Secretary had grossly understated the investment costs and overstated the daily production rates and reserves, then the timing, locations, size and number of pipelines, drilling wells and duration of construction may differ from the Secretary's projections, with resultant environmental and socio-economic impacts (offshore and onshore) qualitatively and quantitatively different from those estimated in the NEPA documents." (Op. 57) (JA 79).

The Court concluded that the Secretary had indeed seriously and grossly misrepresented or omitted the economic costs and benefits of the planned action and that the Secretary's errors in this regard were of such a substantial nature as to constitute, for NEPA purposes, a failure to make a meaningful inquiry.

D. The Secretary's Decision Was Arbitrary and Capricious.

"While we find it unnecessary to consider plaintiff's submission that NEPA requires substantive review of the administrative decision, and no such review has been undertaken in this case, there is no disagreement that, at

a minimum, the Secretary's decision may not be arbitrary and capricious." (Op. 57, 57a) (JA 79, 80).

1. The Administrative Record (Decision Documents)

NOIA's Argument

The lower Court had no warrant to look behind the EIS and to probe the Secretary's decision-making process (*NOIA's Brief*, 51, 52).

Federal Appellants' Argument

The Court exceeded its mandate under NEPA by reviewing matters outside the EIS and by basing its finding that the Secretary's cost-benefit analysis was inadequate upon information contained in the PDOD (*Federal Appellants' Brief*, 47-49).

Answer

The district court's review was based on the PDOD's and FES's which are part of the administrative record that was before the Secretary at the time he made his decision. The PDOD's and FES's are "detailed statements" within the meaning of NEPA and together comprise the NEPA decision documents relied on by the Secretary in deciding to hold lease Sale 40. Indeed, in a letter from the Department of Interior to the United States Attorney in this case, it is specifically acknowledged that the PDOD, among other documents, contained information specifically relied upon by the Secretary in his decision to proceed with OCS lease sale No. 40 (Plaintiff's Ex. 102) (JA 3501-3503). Thus they are clearly within the proper scope of judicial inquiry in this case. See *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 2 ERC 1250, 1257 (1971).

No NEPA requirement has ever received greater judicial emphasis than that which prescribes "a detailed statement" and adequate discussion and consideration of rea-

sonable "alternatives to the proposed action." 42 U.S.C. § 4332. The significance of this one section of the Environmental Impact Statement with respect to the NEPA process as a whole has been stressed repeatedly. (See Op. 68-71, and cases cited thereon) (JA 91-94). The purpose of a site-specific statement requires a discussion of the actual effects of a project on a specific area. As stated by the Court of Appeals for the Second Circuit in *Natural Resources Defense Council v. Callaway*, 524 F.2d 79, 92-93 (2d Cir. 1975):

It is absolutely essential to the NEPA process that the decision maker be provided with a detailed and careful analysis of the relative environmental merits and demerits of the proposed action and possible alternatives, a requirement that we have characterized as "the linchpin of the entire impact statement," *Monroe County Conservation Council v. Volpe*, 472 F.2d at 697-98. Indeed the development and discussion of a wide range of alternatives to any proposed federal action is so important that it is mandated by NEPA when any proposal "involves unresolved conflicts concerning alternative uses of available resources," 42 U.S.C. § 4332 (2) (D).

Required Scope of EIS

Thus, the case law firmly establishes that the EIS must be sufficiently inclusive and informative in its description and factual discussion of the merits of each alternative to allow the Secretary to make a reasoned choice, and to judge the merits of each alternative and to make an informed choice to proceed with the project; the EIS will not suffice if it provides only generalities and self-justification. *NRDC v. Morton*, 458 F.2d 827, 836, 3 ERC 1558 (D.C. Cir. 1972) Specifically, the cases establish that the environmental impact statement must:

1. Gather in one place, discuss and weigh those matters such as economics, foreign relations and national security, which are necessary to a consideration of

the pertinent alternatives, and the relative environmental impact of alternatives. (*Natural Resources Defense Council v. Morton*, 458 F2d 827, 3 ERC 1558, 1560, 1561 (D.C. Cir. 1972).)

2. Provide a basis for (a) evaluation of the benefits of the proposed project in light of its environmental risks, (b) comparison of the *net balance for the proposed project* with the environmental risks presented by alternative courses of action. (*Natural Resources Defense Council v. Morton*, *supra*, 3 ERC, at 1558, 1561) (Emphasis added).
3. Set forth a finely tuned and systematic balancing analysis of those environmental amenities, economic and technical considerations, costs and benefits, which are in conflict with each other (*Calvert Cliffs Coordinating Committee v. AEC*, 449 F2d 1109, 2 ERC 1779, 1781, (D.C. Cir. 1971)), observing the standard that environmental factors are to be accorded peer status with dollars and technology in the agency's decision making. (*EDF v. Corps of Engineers*, (*Tombigbee*), 492 F2d 1123, 6 ERC 1513, 1519, 5th Cir. 1974); and
4. Strike a balance of costs and benefits which is not arbitrary, or which does not clearly give insufficient weight to environmental values. (*EDF v. Froehlke*, 473 F2d 346, 4 ERC 1829, 1833 (8th Cir. 1972).)

Interior's Restriction of Scope of FES Sale 40

In the case at hand, the Interior Department restricted the scope of the Final Environmental Program Statement (FES) and of FES-Sale 40 by deliberately excluding therefrom, and relegating to the PDOD's important data required to be discussed, considered and weighed in the FES's, namely the economic evidence, criteria and options relevant to the issues of need, alternatives and justified resource commitments all of which were raised by the proposed Outer Continental Shelf (OCS) accelerated leasing program and by proposed lease Sale 40.

This was precisely the type of economic data which *NRDC v. Morton*, 458 F2d 827, 3 ERC 1558 (D.C. Cir. 1972) held should have been considered in the Interior Department's environmental impact statement for offshore oil and gas leasing. There the Court ruled that NEPA requires that the Interior Department's impact statement on environmental effects of offshore oil leases contain a discussion of reasonable alternative courses of action even though the Department lacks power to adopt or put such alternatives into effect.

The Court observed that the alternatives not discussed involved economic considerations and included meeting energy demands by federal legislation or administrative action freeing current onshore and state-controlled offshore production from state market demand prorationing or a change in the Federal Power Commission's natural gas pricing policies, and the elimination of oil import quotas. *NRDC v. Morton, supra*, 3 ERC at 1560, 1561

The Court said:

"While the consideration of pertinent alternatives requires a *weighing of numerous matters, such as economics, foreign relations, national security*, the fact remains that, as to the ingredient of possible adverse impact, it is the essence and thrust of NEPA that *the pertinent statement serve to gather in one place a discussion of the relative environment impact of alternatives.*" (*Id.* at 1561) (Emphasis added)

The Court clearly recognized that environmental and economic factors are linked and that the environmental impact and alternatives to near and long term solutions to the energy supply problem require continuing review, in the light of changes in technology or in the variables of energy requirements and supply. *NRDC v. Morton, supra*, 3 ERC at 1563.

**Secretary Skewed NEPA Process into Separate
EIS & PDOD**

FES Sale 40, V.3, page 41, states:

"To engage in formal economic cost/benefit analysis in the EIS itself would tend to obscure environmental analysis by transforming the statement into an overall decision making document centered around economic considerations and having a program justification focus. A separate overall decision making document, *PDOD* is prepared to provide the Secretary of the Interior with all aspects to be considered concerning this proposed lease sale."

This is a clear admission that the PDOD is not just a summary document (Vol. 3, p. 75), but that the PDOD Sale 40 and the FES-Sale 40 together comprise the decision documents relied on by the Secretary as the basis of his decision to hold lease sale 40. It is also evidence that the Secretary skewed the NEPA process into separate documents and relegated the NEPA required cost/benefit analysis and balancing judgment to the PDOD.

Furthermore the FES statement that it is not intended to have a program justification focus (Vol. 3, p. 41) is itself contradicted by the many statements elsewhere in the FES which purport to justify OCS lease sale 40 as

- 1—replacing importation of foreign oil by tankers (Vol. 2, p. 30) (Vol. 3, pp. 18, 29);
- 2—decreasing imports of oil and thereby improving the balance of payments (Vol. 2, p. 241);
- 3—reducing reliance on foreign imports (Vol. 2, pp. 539, 562, 582, 583);
- 4—avoiding dependence on insecure foreign oil imports. (Vol. 2, pp. 564, 578)

The FES-Sale 40 also contains statements indicating its tie-in with the Programmatic FES. (See for example FES-Vol. 2, pp. 59, 63) The PDOD was an essential part

of the Secretary's decision-making process and the Secretary may not evade his obligation to take NEPA values into account by keeping his thought processes under wrap, but must explicate fully his course of inquiry, analysis and reasoning. *Ely v. Velde*, 451 F. 2d 1130, 1139; 3 ERC 1280, 1286 (4th Cir. 1971)*

Administrative Record Includes Both EIS & PDOD

None of the cases cited by appellants, upon examination, supports their assertion that the District Court's review of the administrative record should have been limited to the EIS.

1. *Montrose Chemical Corp. v. Train*, 491 F.2d 63 (D.C. Cir. 1974) held as exempt from disclosure under the "inter-agency memorandum" exception to the Freedom of Information Act (FOIA) summaries prepared by staff of the EPA of evidence adduced at EPA hearings on DDT, *which were to be used only to assist the EPA administrator in his study of the hearing record and were based solely on evidence in the record of the hearings.*

The case is clearly distinguishable. It is a FOIA case and not a NEPA case. The documents involved were internal communications intended as summaries for the private and deliberative use of the EPA administrator and preserved nothing that was not already in evidence in the record of the hearings. In contrast, in the case at bar, the EIS's and PDOD's were decision documents each setting forth the facts and evidence which the Secretary relied on

* Even if this case had been decided solely on the basis of the FES-Sale 40, then it still must be found wanting because the FES: 1) lacks an assessment, weighing and balancing of the economic and technical benefits of lease sale 40, weighed against the environmental costs and the alternatives which will affect the balance of values, *Calvert Cliffs Coordinating Committee v. AEC*, 449 F.2d 1109 (D.C. Cir. 1971); 2) lacks a cost/benefit analysis, *Montgomery v. Ellis*, 364 F. Supp. 517, 521, 5 ERC 1790, 1792 (N.D. Ala. 1973); and 3) presents only a catalogue of environmental factors and does not explicate fully its course of inquiry, its analysis and its reasoning, *Ely v. Velde*, 451 F. 2d 1130, 1139 (4th Cir. 1971).

in reaching his decision to hold lease Sale 40. There was nothing private or internal about any of these documents. The Secretary declared publicly that he would prepare a PDOD setting forth the economic and technical matters he would consider before reaching his decision to hold lease Sale 40.

Since the Secretary was required to give environmental protection peer status with economic and technical considerations in his balancing analysis, *Calvert Cliffs v. AEC*, 449 F2d 1109, 2 ERC 1779, 1781 (D.C. Cir. 1971), it follows that the PDOD's were decision documents along with the EIS's and were not exempt from disclosure under any claim of privilege. Inquiry into the adequacy of the PDOD's was not an intrusion into the mental or deliberative processes of the Secretary but rather a probe to determine whether there was a rational basis for his decision and if it was permissible under the rule of *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 2 ERC 1250 (1971).

Finally, assuming the PDOD's were intra-agency memoranda, since they were adopted by the Secretary as a rationale for his decision to hold lease Sale 40, they became part of the public record and were thus subject to judicial review.

As the Court in *Montrose Chemical Corp. v. Train*, *supra*, 491 F2d at 70, said:

"Furthermore, this case is distinctly different from other FOIA cases where a decision maker has referred to an intra-agency memorandum as a *basis* for his decision. *In such cases this court has required disclosure of the memoranda, for once adopted as a rationale for a decision, the memorandum becomes part of the public record*" (Emphasis added)

2. *Camp v. Pitts*, 411 U.S. 138 (1973), involved an application to the Comptroller of the Currency for a bank

charter, and presented the narrow question of what the proper procedure is to be followed when a reviewing court determines that an administrative agency's stated justification for informal action (i.e. its administrative record) does not provide an adequate basis for judicial review. Under these circumstances the Court ruled that the remedy was not to hold a *de novo* hearing, but to obtain from the agency, either through affidavits or testimony, such contemporaneous or additional explanation of the reasons for the agency decision as may be necessary, and then to judge the validity or propriety of the agency action by the appropriate standard of review. If that decision is not sustainable on the administrative record made, then the agency's decision must be vacated and the matter remanded to him for further consideration. *Camp v. Pitts*, *supra*, 411 U.S. at 111.

Camp v. Pitts is satisfied by the procedure and standard of review followed in the case at bar. The district court permitted discovery which disclosed that the administrative record before the Secretary included various decision documents, i.e. the EIS's and PDOD's, which explained the reasons for the Secretary's decision to hold lease Sale 40. After hearings and trial, the District Court judged the Secretary's decision, based on the administrative record, to be arbitrary and capricious and in violation of NEPA.

3. *Independent Meat Packers Association v. Butz*, 526 F2d 228 (8th Cir. 1976), dealt with a dispute as to the extent to which a reviewing court in conducting "plenary review" mandated by *Overton Park*, *supra*, can go outside the administrative record to hear expert testimony on the merits of disputed regulations challenged under the arbitrary and capricious standard of review. See 5 USC § 706 (2) (A).

The Court cited with approval *Overton Park's* definition of the administrative record subject to judicial review

as that which was before the Secretary at the time he made his decision, *including factors that were considered or the Secretary's construction of the evidence*, supplemented, if necessary, by affidavits, depositions, or other proof of an explanatory nature. *Independent Meat packers Association v. Butz*, *supra*, 526 F2d at 238, 239. The Court described the full administrative record as including numerous research studies, over 4000 comments and the Department's construction of the evidence. *Id.* at 239.

Thus, the case supports Appellees' view that the full administrative record subject to judicial review in the OCS sale at bar includes not only the EIS but all the documents and explanatory evidence which set forth the factors and studies considered by the Secretary and the evidence which he construed at the time he made his decision. These decision documents obviously included all the EIS's and PDOD's.

4. *Silva v. Lynn*, 482 F2d 1282 (1st Cir. 1973) holds that the administrative record includes not only the final statement of the EIS but also the more detailed studies and background of deliberation which form the basis of the final EIS, and the record of expert views and opinions, the technological data and other relevant material on which the agency acted (*Id.* at 1283, 1284). Once this complete record is before the Court it must determine the adequacy of the EIS, using as its source of review power, NEPA and 5 U.S.C. §§ 702 and 706. The judicial inquiries are whether the agency's findings and conclusions in the EIS are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, and whether the agency followed the procedures required by law. (*Id.* at 1283.)

5. *National Nutritional Foods Association v. Food & Drug Administration*, 491 F2d 1141 (2d Cir. 1974) held that it is not the function of a reviewing court to probe

the mental processes of an agency official or to inquire into the relative participation by the agency official and his subordinates absent a strong preliminary showing of bad faith.

As indicated elsewhere in this brief, the District Court in our case did not probe the subjective mental processes of the Secretary of the Interior but inquired into objective matters, to wit, whether his decision complied with NEPA. Given the District Court's finding that strong circumstantial evidence had been demonstrated of the Secretary's lack of good faith compliance with NEPA, the District Court would have been justified, had it chosen to do so, to probe into the Secretary's intent and mental processes at the time he decided to hold lease Sale 40.* The Court, however, adopted a conservative approach to this case, and invalidated the sale strictly on the basis of the NEPA shortcomings of the Secretary's decision documents.

To permit the Secretary to exclude from the EIS information and data critical to an understanding of such important issues as those concerned with need, alternatives and justified resource commitments, and to then assert that the District Court was thereby precluded from examining such information in its deliberations, would be to fatally impair the integrity of the administrative record and to effectively frustrate the kind of effective judicial review which NEPA demands. See *NRDC v. Morton*, 458 F.2d 827, 3 ERC 1558, 1561 (D.C. Cir. 1972). It would be a strange rule, and none of the cases cited by Appellants so hold, which would bar inquiry into the objective basis of the Secretary's decision, as distinguished from his subjective thought processes.

* See e.g., *E.D.F. v. Corps of Engineers*, 470 F. 2d 289, 4 ERC 1721 (8th Cir. 1972), *cert. denied*, 5 ERC 1416 (1973).

2. Standard of Review

Appellant NOIA's and Federal Appellants' Argument

The Court engaged in a substantive review of the administrative decision of the Secretary and erred in its treatment of the evidence in arriving at its conclusion that Interior's decision was arbitrary and capricious. (*NOIA's Brief*, 52, 53, *Federal Appellants' Brief*, 43, 45.)

Answer

The District Court recognized that the Secretary's duty under NEPA to compare the proposed OSC Sale 40 to its alternatives, and to weigh the latter and their environmental and socio-economic effects, depends vitally on an accurate cost-benefit analysis, without which the Secretary and other decision makers cannot adequately determine priorities and what course of action is in the public interest. In holding that the Secretary manifestly failed in his responsibility to fulfill his duty, the Court concluded on the basis of an unprecedented fact-intensive record that the Secretary's decision to go forward with the leasing of the Sale 40 acreage was arbitrary and capricious.* The

* The Supreme Court has interpreted the arbitrary and capricious, abuse of discretion standard, as requiring the Court to determine whether "the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416, 2 ERC 1250, 1256 (1971); see L. Jaffee, *Judicial Control of Administrative Action* 586 (1965). A decision may be arbitrary and capricious if the agency fails to consider all relevant factors. See *Citizens to Preserve Overton Park, supra*; *Mulloy v. United States*, 398 U.S. 410 (1970); *Scenic Hudson Preservation Conference v. EPC (1)*, 354 F.2d 608, 620, 1 ERC 1084 (2d Cir. 1965), *cert. denied*, 384 U.S. 941, 2 ERC 1909 (1966). The same result obtains if irrelevant or impermissible factors were given weight in the decision. See *District of Columbia Fed'n v. Volpe*, 459 F. 2d 1231, 3 ERC 1143 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1030, 3 ERC 1950 (1972) (Secretary of

(footnote continued on following page)

District Court's decision may be upheld either under A.P.A. 5 U.S.C. § 706(2)(D), the "without observance of procedure required by law" standard, or under 5 U.S.C. § 706(2)(A), the "arbitrary and capricious standard", because the Secretary's decision was in clear violation of both of these standards.

In arriving at its holding, the District Court was neither engaging in a substantive review of the Secretary's decision to proceed with the sale nor was it "second guessing" that decision as appellants suggest. Rather, the District Court, on the basis of substantial and unrefuted evidence developed during the hearings in this case, found that because the Secretary committed gross errors in his cost-benefit analysis, he was precluded from adequately performing his *procedural* obligations under NEPA, including the consideration of various available alternatives to the sale.

Substantial Inquiry Rule

The District Court was justified in gaining access to all materials relied on by the Secretary in reaching his decision to hold lease Sale 40, and was entitled to and did conduct a substantial, careful, searching inquiry and a thorough, probing, in-depth review into the facts surrounding the Secretary's action. *Citizens to Preserve Overton Park v. Volpe*, *supra*, 2 ERC at 1256. The District Court's

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Transportation yielded to improper political pressure); *Wong Wing Hang v. Immigration & Naturalization Serv.*, 360 F. 2d 715, 719 (2d Cir. 1966) (citing example of racial discrimination considered in decision). Even if all relevant factors are weighed, a decision is still reversible if it is a "clear error of judgment." *Citizens to Preserve Overton Park*, *supra*, at 416, 2 ERC at 1256. The Court based its interpretation on *In Re Josephson*, where an abuse of discretion was defined as "a clear error of judgment in the conclusion . . . reached upon a weighing of the relevant factors." 218 F. 2d 174 (1st Cir. 1954). Cf., *Wong Wing Hang*, *supra* ("clearly erroneous"); *Frisby v. Larsen*, 330 F. Supp. 545 (N.D. Cal. 1971) (denial of conscientious objector status held unreasonable on basis of whole record).

duty was to determine, and it did:

- 1) Whether the decision to lease was based on a consideration of the relevant factors articulated by the OCS Act, NEPA, and other relevant statutes;
- 2) Whether any impermissible factors have entered into the Secretary's reasoning process;
- 3) Whether the Secretary has committed a clear error;
- 4) Whether the Secretary followed the necessary procedural requirements of NEPA.

See *Smith v. F.T.C.*, 403 F.Supp., 1000, 1006-1009 (D.Del. 1975).

NEPA has influenced the character of administrative litigation and indeed was designed to reform agency decision making. The Secretary was required to but did not articulate in requisite detail the standards and principles that governed his decision to hold lease Sale 40. *EDF v. Ruckleshaus*, 439 F.2d 584, 2 ERC 1114, 1122 (D.C. Cir. 1971). As the Court there said:

Courts are increasingly asked to review administrative action that touches on fundamental personal interests in life, health and liberty. These interests have always had a special claim to judicial protection, in comparison with economic interests in a rate-making or licensing proceeding. *EDF v. Ruckleshaus*, *supra*, 439 F.2d at 598.

A reviewing Court must therefore decide whether the conclusion the agency reached was erroneous by evaluating the environmental arguments for and against the proposed action; in other words, by confronting the factual issues.

In the instant case, the Secretary represented explicitly in his NEPA documents the costs of developing OCS Sale 40 and its estimated reserves and production rates. The Secretary advanced this information as justification for

his decision to hold lease Sale 40. Thus, the accuracy of the Secretary's figures was open to challenge. If the Secretary seriously erred, as Donkin proved he did (see *Brief, supra*, at 14-24), the Secretary's cost-benefit analysis was defective within the meaning of NEPA. Similarly, the evidence showed that the EIS documents failed to adequately assess the tanker-pipeline issue (see *Brief, supra*, at 18-21), the alternative of separating exploration from production (see *Brief, infra*, 50-57), the impact upon costs of development of Sale 40 of state and local governments exercising their land use controls to bar the launching of Sale 40 pipelines at specific locations (see *Brief, supra*, 3-10), thus further skewing the accuracy of the Secretary's cost-benefit analysis.

The District Court Applied the Proper Standard of Review

By receiving evidence on the various issues left unresolved by the Secretary's inadequate NEPA documents, and by then making findings of fact on the basis of conflicting evidence, the Court was fulfilling its NEPA mandate to determine whether the agency conducted a full, good faith consideration and balancing of environmental factors and, applying NEPA standards, whether its ultimate decision was arbitrary and capricious. *Calvert Cliffs Coordinating Committee Inc. v. AEC*, 449 F.2d 1109, 2 ERC 1779 (D.C. Cir. 1971).

None of the following cases cited in Appellants' briefs supports their contention that the District Court exceeded its authority or misinterpreted its function as a trier of fact in holding that the Secretary violated NEPA.

1. In *Dunlop v. Bachowski*, 421 U.S. 560 (1975), a complaint was filed with the Secretary of Labor by a defeated candidate for a union office alleging violations of Sec. 401 of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. § 481, thereby requiring the Secretary to investigate the complaint and decide whether to bring a civil action to set aside the election. The ques-

tion ultimately raised before the Supreme Court was whether 5 U.S.C. § 706 (2) (A) of the Administrative Procedure Act authorized a trial-type inquiry into the factual bases of the Secretary's conclusion that no violations occurred affecting the outcome of the election.

The Court decided that it did not authorize such inquiry relying on the fact that the Congressional objectives in enacting LMRDA were to prevent individuals from blocking or delaying union elections by filing federal suits and that hence it was the Congressional purpose narrowly to limit the scope of judicial review of the Secretary's decision. *Dunlop v. Bachowski, supra*, 421 U.S. at 587. However, the Congressional purpose in enacting NEPA contains no such narrow restriction of the scope of judicial review of agency decisions. On the contrary, the underlying purpose is full environmental disclosure and the scope of judicial inquiry is as set forth in *Overton Park, supra*, requiring a judicial determination of whether the Secretary considered all relevant NEPA factors, and whether he committed clear error of judgment, or otherwise violated NEPA.

2. *Bowman Transportation, Inc. v. Arkansas Best Freight*, 419 U.S. 281 (1974) holds, as did *Overton Park, supra*, previously, that under the "arbitrary and capricious" standard, a reviewing court must, through a searching and careful inquiry into the facts, consider whether the agency's decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. Nothing in *Bowman Transportation*, which involved an action to annul certificates of public convenience and necessity to motor carriers granted by the I.C.C. after adjudicatory hearings, supports Appellants' view that the District Court in this case embarked upon an inappropriate scope of review. On the contrary, it scrupulously applied the arbitrary and capricious standard of review and found that the Secretary's decision to

hold lease Sale 40 was not based on a consideration of the relevant factors under NEPA and that the Secretary committed a clear error of judgment.

3. *Daly v. Volpe*, 514 F2d 1106 (9th Cir. 1975) is distinguishable and, to the extent applicable, supports Appellees' position in the case at bar.

In *Daly*, the Ninth Circuit affirmed the district court's dissolution of an injunction which had suspended construction of a segment of interstate highway. *The Court of Appeals held that the District Court's findings were not clearly erroneous, that the EIS adequately discussed all alternatives including the one advanced by Appellant, and that the EIS adequately guaranteed costs, benefits and values.*

Thus the Court of Appeals deemed itself bound by the facts as found by the district court (*Id.* at 1109).

In contrast to *Daly*, in the case at bar, the District Court found on a fact-intensive record, that the EIS did not adequately discuss alternatives and that its quantification of the costs and benefits of the Sale 40 project were grossly inaccurate.

Under the clear error rule (Fed. R. Civ. P. 52 (a)), this Court is bound by the facts as found by the District Court.

4. *Minnesota Public Interest Research Group v. Butz*, 541 F2d 1292 (8th Cir. 1976), held that the district court erroneously concluded that the Wilderness Act does not permit commercial logging in the virgin forest areas of the Boundary Waters Canoe area. The appellate court also held that the district court's review of the EIS was infected with an impermissibly broad view of its power to review the Forest Service's substantive decision to permit logging in certain areas in that the court improperly concerned itself with the substantive merits of the timber policy which the Forest Service chose to follow in its Man-

agement Plan, instead of the adequacy of the timber policies *considered* in the EIS (*Id.* at 1301, n. 16).

Judge Weinstein's decision cannot be faulted on the basis of *MPIRG* because he correctly dealt with the adequacy of the Secretary's cost/benefit analysis—of his evaluation of alternatives to lease Sale 40—and not the substantive merits of lease Sale 40.

5. *Trout Unlimited v. Morton*, 509 F2d 1276 (9th Cir. 1974), cited by the Federal Appellants for the proposition that the District Court conducted an improper review of the Secretary's cost/benefit analysis, is distinguishable on several points. First, in *Trout* the district court, after hearings and trial, found the EIS adequate, and denied injunctive relief. On appeal, therefore, the burden was on plaintiffs-appellants to demonstrate clear error on the part of the district court. They failed in this burden. The appellate court agreed with the district court's finding that the EIS was sufficiently detailed to aid in the substantive decision of whether to proceed with the project in light of its environmental consequences. *Trout Unlimited v. Morton*, *supra*, 509 F2d at 1282. The appellate court stated, moreover, *that the testimony offered at trial was not sufficient to rebut the EIS's conclusion regarding environmental impact. Id.* at 1284.

The latter language is noteworthy for two reasons. First, it indicates that in a NEPA case the trial court must receive testimony as to the sufficiency of the EIS conclusions regarding environmental impact, which is what the District Court did in the case at bar.* Secondly, it points up the specific function of the trial court as the dispute-deciding adjudicator of the adequacy of the EIS, a role not to be invaded by the appellate court.

* This also disposes of appellant's argument that trial type inquiry is not authorized. (See *Federal Appellants' Brief*, ¶ 45; *NOIA's Brief*, at 56.)

On the issue of alternatives, *Trout Unlimited v. Morton*, *supra*, 509 F2d at 1286, also found:

"It also appears from the record of the proceeding below that other less reasonably related alternatives to the projects were considered and rejected." (Emphasis added).

The appellate court's deference to the trial court's findings based on the record regarding the Secretary's consideration of alternatives is obvious.

In the case at bar, the District Court's finding on the evidence that the Secretary did not adequately evaluate the alternatives is abundantly supported by the record and is similarly entitled to appellate deference.

Finally, *Trout Unlimited* does not support Appellants' contention regarding the cost/benefit issue. There the EIS contained no formal mathematically expressed cost/benefit analysis and the Court said it was not necessary under NEPA because there was sufficient disagreement about how environmental amenities should be valued to permit any value so assigned to be challenged on the ground of subjectivity. *Id* at 1286.

In the case at bar, however, the EIS contained a numerically expressed cost/benefit analysis which was grossly inaccurate. It was not challenged on the grounds of subjective valuation of environmental amenities but rather because it grossly underestimated investment costs and overstated peak oil and gas production levels—information essential to the Secretary's understanding of the net value of the project, and indispensable to the Secretary's decision as to whether to proceed with the sale or to consider other options. The trial court's finding of gross error in the Secretary's cost/benefit analysis and the economic and environmental consequences of such error were based on a fact intensive record of testimony and other evidence, and

should not be disturbed either on the authority of *Trout Unlimited* or any of the other cases cited by appellants on the subject of cost/benefit analysis.

Thus, in this case, the District Court did not substitute its judgment for that of the Secretary with respect to adopting one alternative as opposed to another or with respect to the violation of holding lease Sale 40; rather the Court found that the Secretary, through his own errors and omissions, had placed himself in a position where no reasoned choice or judgment by the Secretary was possible.

The District Court declined to base its holding upon a theory that NEPA requires substantive review of the Secretary's decision but rather determined that the Secretary had acted arbitrarily and capriciously in approving the sale. In so doing, the Court applied a proper standard of review under the Administrative Procedure Act, 5 U.S.C. § 706(2)(a), or in the alternative, under 5 U.S.C. § 706(2)(d). Since the Secretary's decision was reached procedurally without individualized consideration and balancing of environmental factors, conducted fully and in good faith, it was the responsibility of the Court to invalidate the sale.

Substantive NEPA Review is Also Appropriate Here

Even assuming, *arguendo*, that the District Court engaged in a substantive NEPA review of the Secretary's decision, this Court should join those circuits who have concluded that such review is appropriate. See *EDF v. U.S. Army Corps of Engineers*, 470 F2d 209, 4 ERC 1721 (8th Cir. 1972), *cert. denied* 5 ERC 1416 (1973).*

* Six circuits have found that agency action in violation of the substantive provisions of NEPA may be enjoined if the agency action is arbitrary and capricious. See *Calvert Cliffs Coordinating Committee v. AEC*, 449 F2d 1109, 1115, 2 ERC 1779 (D.C. Cir. 1971); *Environmental Defense Fund v. Corps of Engineers*,

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These courts have based their holdings that NEPA creates substantive rights and that agency determinations are reviewable on the merits by reference to both statutory and judicial authority—specifically, statutory construction of NEPA, the Administrative Procedure Act's presumption of reviewability, and prior decisions in favor of limited review. In addition, in *EDF v. U.S. Army Corps of Engineers*, *supra*, the Court's policy statement of the obligation of review* suggests the importance of judicial review in protecting environmental values and implies a requirement that the agency expose the reasoning behind its decision.

By interpreting NEPA as creating substantive rights and asserting a judicial obligation to review agency decisions on the merits, this Court will strengthen NEPA's function in assuring consideration of environmental values in agency decision making. The requirement that the agency fully explain its reasoning on the record will aid in checking the most extreme abuses of administrative discretion, and, more importantly, will help to rationalize the administrative process. There is no question that the outcome of this case will profoundly affect the seascape and landscape of the Mid-Atlantic region and its human and natural resources for the next quarter century. If this is

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470 F2d 289, 4 ERC 1721 (8th Cir. 1972), *cert. denied*, 5 ERC 1416 (1973); *Sierra Club v. Froehlke*, 486 F2d 946, 953, 5 ERC 1920 (7th Cir. 1973); *Conservation Council of North Carolina v. Froehlke*, 473 F.2d 664, 665, 4 ERC 1044 (4th Cir. 1973); *Silva v. Lynn*, 482 F2d 1281, 1283, 5 ERC 1654 (1st Cir. 1973); *Jicarilla Apache Tribe of Indians v. Morton*, 471 F2d 650, 3 ERC 1129, (10th Cir. 1971). See generally, Note, Substantive Review Under the National Environmental Policy Act, 3 *Ecology Law Quarterly* 173 (1973).

* "Given an agency obligation to carry out the substantive requirements of the Act, we believe that courts have an obligation to review substantive agency decisions on the merits." *EDF v. Corps of Engineers*, 470 F 2d at 297-298, 4 ERC 1725-26.

to happen as the result of action taken by the Secretary, the latter should be held to the highest standards incumbent upon a fiduciary of public resources. Here, the Secretary has neither complied with the procedural requirements of NEPA, nor has he fulfilled the substantive obligations of that Act.

NOIA's and Federal Appellants' Argument

In its initial opinion after the preliminary injunction hearings, the District Court found that the EIS adequate with respect to all of the issues, which finding is now conclusive despite the additional evidence taken at the trial. (*NOIA's Brief*, 4; *Federal Appellants' Brief*, 23.)

Answer

Tangential to appellants' argument that the District Court did not apply an appropriate standard of review in this case is their assertion that the Court was bound by the findings it made at the preliminary hearing stage of this proceeding. However, the District Court said that while the preliminary memorandum *indicated*, on the basis of a preliminary hearing, only one ground for declaring NEPA violated, the final hearings revealed that NEPA had been violated in a number of respects (Op. 1) (JA 23). Extensive new testimony at the trial and numerous documents served to confirm and expand the bases of the Court's earlier tentative conclusion that NEPA has been violated (Op. 6, 7) (JA 28, 29). The evidence received at the trial pointed up in detail for the first time the abstract and misleading aspects of the operative NEPA documents that prevented any realistic appraisal of either environmental dangers or the practical advantages and disadvantages that would result from the specific Sale 40 leases (Op. 8) (JA 30). For example, the Court found that the NEPA documents, in their critical transportation aspects,

are highly abstract, containing no description of the likely oil and gas delivery routes (Op. 19) (JA 41).*

Information on local land policies and controls and their effects on the specifics of the leasing program were not considered and analyzed (Op. 21, 22) (JA 43, 44). The decision documents lacked site specificity and made no attempt to determine specific likely landfall sites or the ocean or overland routes that would be followed, and instead merely contained brief, vague, and abstract conjecture concerning the extremely broad geographic areas that might be involved (Op. 25) (JA 47). Expert testimony at the trial demonstrated that pipeline routes not only could have been predicted with a high degree of specificity and accuracy, but that such predictions were in fact made by the oil companies (Op. 27, 28). (JA 50). Expert testimony also established that the Secretary made a grossly defective cost-benefit analysis of lease Sale 40 (Op. 43) (JA 65), failed to evaluate separation of exploration and production leasing (Op. 58) (JA 81), and failed to consider the impact of leasing alternative tracts (Op. 71) (JA 94). This mass of new evidence clearly proved the linked, inseparable nature of the NEPA issues which were inadequately addressed by the Secretary and the adverse NEPA consequences of the Secretary's violation, compounded by the strong circumstantial evidence of the Secretary's lack of good faith (Op. 75) (JA 98). In short, the NEPA gap identified by the District Court in its initial decision became a wide yawning chasm under the weight of the additional evidence of violations received at the trial.

* The testimony of Brunjes and Davies highlighted these deficiencies.

Federal Appellants' Argument

The Court may review the District Court's findings under a more relaxed standard of review than the "clearly erroneous" standard, see Rule 52(a), Federal Rules of Civil Procedure, because the findings in question do not resolve disputed facts. (*Federal Appellants' Brief*, 6)

Answer

This Court is bound by the "clearly erroneous" standard in the review of this case. The well-established rule is that the factual findings of a lower court are entitled to great deference and ". . . will not be disturbed (on appeal) unless there is an abuse of (the trial court's) discretion . . . or unless there is a clear mistake of law." *Triebwasser & Katz v. American Telephone and Telegraph Co.*, 535 F. 2d 1356, 1358 (2d Cir. 1976).^{*} Here, the appli-

^{*} The only recognized exception to this rule is when the district court's decision is based not on any testimonial evidence but rather solely on a written record consisting of pleadings, depositions, affidavits and other documents. "The rationale for this exception to the general rule is that the 'clearly erroneous' test of Rule 52(a) of the Federal Rules of Civil Procedure, which otherwise applies to the findings required by Rule 52 to be made when injunctive relief is granted or denied, is not controlling when the district court's findings were based exclusively on documentary evidence. This is so, the reasoning goes, because where the credibility of witnesses is not at stake, the appellate court is in as good a position as the district court was to draw inferences and to make findings from the written record." *New York v. NRC*, 9 ERC 1825, 1830, n. 6 (2d Cir. 1977), citing to *San Filippo v. United Brotherhood of Carpenters & Joiners*, 525 F. 508, 511, (2d Cir. 1975). The idea that an appellate court is not bound by the "clearly erroneous standard" when reviewing a documentary record has been widely criticized on a number of scores. See e.g. *Dopp v. Franklin National Bank*, 461 F. 2d 873, 886-889 (2d Cir. 1972) (dissenting opinion of Justice Clark); see also A.C. Wright & A. Miller, *Federal Practice and Procedure: Civil* § 2587 at 740-749 (1971), the most notable of which is that appellate reliance on such a concept presents an obvious invitation

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cation of that rule is particularly appropriate. The evidentiary hearings in this case, upon which this appeal is based, lasted 17 days; the transcripts, together, exceed 4,000 pages in length. In addition, 32 witnesses gave testimony, and over 250 documents were received as exhibits. The District Court assiduously and specifically set forth reasons based on this record to support its finding that the Secretary failed to fulfill his NEPA obligations. As this Court noted in *State of New York v. NRC*, 9 ERC 1825, 1831 (2d Cir. 1977):

“ . . . the breadth of appellate review is to some extent dependent upon the specificity of the findings made by the trial court. *As the findings and the reasons supporting them become more specific, detailed and clearly articulated, the scope of review is likely to be narrowed.*” (Emphasis added)

District Court's Findings Resolved Disputed Factual Issues

Nor is it true that there were no disputed factual issues in this case. Indeed, virtually every issue in the proceedings below was hotly contested. For example, the adequacy of the Secretary's cost/benefit analysis, see *Brief, supra*, his consideration of the power of state and local governmental entities to prohibit the landing of pipelines on their shores, see *Brief, supra*, were issues which generated a wealth of conflicting testimony by witnesses of both parties. The propriety of the District Court's receiving and weighing this evidence, and then making findings

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to abuse, and misconceives the respective functions that should be performed by trial and appellate courts. *Lundgren v. Freeman*, 307 F. 2d 104, 114 (9th Cir. 1962). In the case at bar, of course, the District Court heard extensive live testimony, then carefully weighed the evidence, and meticulously spelled out its findings of fact and conclusions of law in an exhaustive opinion. The District Court's findings of fact, therefore, should not be disturbed by this Court, absent a clear showing that the court abused its discretion. No such showing has been made in this case. See *Brief, supra*.

of fact based upon its resolution of the conflicts in testimony, can hardly be disputed.*

Secretary's NEPA Review a Charade

Finally, it should be noted that a strong showing was made at the hearings below that the Secretary's decision to proceed with Sale 40 was made without considering the NEPA documents at all, and ". . . that the NEPA documents and public hearings were but a charade; that the decision to lease was a foregone conclusion once Presidents and those in their administrations, including successive Secretaries of the Interior, decided some years ago that production of Atlantic hydrocarbons should proceed speedily." (Op. 75) (JA 98). Despite this "strong circumstantial evidence", the District Court declined to base its decision that NEPA had been violated as a result of the Secretary's bad faith in proceeding with the sale, finding that:

"To do so would constitute review of the 'mental processes' of the Secretary. Under general principles of review of agency action, such an inquiry should be avoided by courts, if it is at all possible to decide a case on other grounds.

'(T)he courts should avoid wherever possible making detailed inquiries into the reasons for executive decisions and examining communications among high officials which are the basis of their exercise

* Indeed, Appellant, NOIA, itself, employed a consultant to rebut the testimony of Plaintiffs' witness Donkin, or the subject of the anticipated costs and benefits associated with Sale 40 acreage. However, despite the consultant's presence in the courtroom throughout the testimony of Mr. Donkin, NOIA elected not to present its rebuttal witness. Without commenting on the possible reasons why NOIA chose not to present this witness, we deem it particularly inappropriate for Appellants now to criticize Judge Weinstein for having relied, in part, upon the testimony of Mr. Donkin, when they had more than ample opportunity to present their own witnesses on these subjects. See "NOIA Intervenor Designation of Witnesses", Summary of Testimony of Dr. Edward Erickson, filed January 3, 1977, Docket Entry No. 116.

of judgment. Cf. 8 Wigmore, § 2378(3) (McNaughton rev. 1961); Gellhorn and Byse, *Administrative Law Cases and Comments*, 617-618 (4th ed. 1960). Not only is this reluctance supported by proper respect for the separation of powers, but by the practical consideration that it is often impossible for a highly placed official to analyze or remember the varied emotional and intellectual reasons for a decision.'

United States v. Schipani, 289 F. Supp. 43, 64 (E.D. N.Y. 1968), aff'd. 414 F. 2d 1262 (2d Cir. 1969)." (Op. 82) (JA 105)

Rather, the Court found ample other grounds, *based on the evidentiary record*, that the Secretary had grossly violated his procedural NEPA obligations.

E. Failure to Evaluate Separation of Exploration and Production Leasing.

NOIA's and Federal Appellants' Argument

NOIA argues that the sole evidentiary basis for Judge Weinstein's finding that the government did not adequately discuss the alternative of separating exploration and development is the trial testimony of Judith Gresham (*NOIA's Brief*, 2, 41; *Federal Appellants' Brief*, 39-43).

Answer

Judge Weinstein's finding was based on more than the testimony of Judith Gresham. He noted the "woefully inadequate" discussion of this alternative in the Sale 40 EIS (Op. 61) (JA 84). He ruled that the EIS statements on aspects of this subject were conclusory, undocumented and probably inaccurate (Op. 62) (JA 85). There was no attempt to measure the government's potential exploration costs against the value of the information that exploration would reveal, especially if oil and gas

are found (Op. 62) (JA 85). There was no discussion of the possibility that the government could assume only part-interest in an exploratory effort, or require bidding companies to provide "proprietary" information concerning potential reserves (Op. 62, 63) (JA 85, 86). In short, the discussion was "mere window dressing" designed to make it appear as if a candid analysis has taken place when in fact the decision on the issues had already been made by the Secretary (Op. 63) (JA 86). Judge Weinstein found that the FES-Sale 40 and the PEIS failed to provide the information a decision maker requires for an adequate evaluation of the feasibility of the alternative of separating exploration and production or its costs and benefits relative to the proposed action (Op. 65) (JA 88). There was ample additional evidence in the record which supported Judge Weinstein's finding.

Donkin testified that the alternative of separation of exploration and production was a viable superior alternative to holding lease Sale 40 (JA 952-954). He testified that the government could drill about 30-45 exploratory wells in the Sale 40 area for a cost of \$3 million per well (JA 950-953). This contradicted the FES-Sale 40 estimate of \$4-\$7 million per well (Op. 62) (JA 85) and substantiated Judge Weinstein's finding that the government's cost figures were probably inaccurate (Op. 62) (JA 85).

Dr. Newlon testified that the PDOD failed to evaluate the separation alternative (JA 930-931); (Ex. 72, pp. 5, 6; Ex. 69).

Christopher Rand also testified that the Secretary failed to evaluate the alternative of government partial exploration as a means of diversifying exploration strategies (JA 1542-1544).

In fact, frequently during both evidentiary hearings, the common sense option of separation made itself explicitly or implicitly manifest as an alternative which would permit oil and gas exploration, environmental data gathering

and coastal zone management planning and the analytical processes incidental thereto, to proceed apace without delay, and under full control by the government of the public OCS resources, and deferring to the end the final massive production step and its concomitant heavy risks, investment and commitment of resources.

Advantages of Separating Exploration & Production

The rationale of such separation is that at the end of the data gathering, assessment and planning process, and before irreversible commitments are undertaken, all decision makers and interested parties will have optimized their knowledge of the risks, costs and benefits of accelerated OCS leasing and lease Sale 40. The advantages of the separation alternative became apparent as the Plaintiffs' scientific experts analyzed the deficiencies of the decision documents. The advantages include:

1. Time to obtain more complete and better information as to:
 - a. quantity, location and value of oil and gas reserves in frontier areas;
 - b. amount of Gulf of Mexico oil and gas production;
 - c. other domestic and foreign sources of energy;
 - d. Future prices of oil and gas and demand and supply responses;
 - e. impact of energy conservation;
 - f. results of FTC proceedings against major oil companies *re:* anti-competitive practices;
 - g. inputs regarding anticipated onshore impacts needed for coastal zone management planning (locations and feasibility of pipelines, refineries and other onshore support facilities, etc.)
 - h. baseline studies and other environmental studies, and to develop predictive capability as to effects of oil

on marine environment; acquisition of best available fisheries data from NMFS;

i. requirements to be incorporated into development or production plans, lease stipulations and termination clauses;

2. Time to study the North Sea experience.
3. Time to develop or improve risk analysis models for offshore and nearshore spills.
4. Opportunity to coordinate lease productions plans with CZM and fisheries management planning, and to estimate amount of federal assistance needed.
5. Time to take advantage of improvements in oil spill prevention and clean up technology.
6. Improvements in OCS operating orders.
7. Development of standards for defining unacceptable environmental risks and cost/benefit models for quantifying and balancing economic values of renewable and non-renewable resources.
8. Opportunity to assess optimal deployment of capital for energy development.
9. Opportunity to assess potential for inter-fuel substitution.
10. Opportunity to assess a range of options and alternatives, such as conserving OCS oil and gas as a strategic reserve for future use, retaining it as a standby production capacity, etc.

As shown by Donkin's testimony, the Secretary seriously understated investment costs associated with finding and developing OCS Sale 40 acreage, and overstated its anticipated production rates and reserves (JA 1833-1840, 1856-1862C).

**Secretary's Failure to Evaluate Separation Alternative as
an Aid to Decision Making re Cost-Benefit, Tanker-
Pipeline, CZM & Alternatives Issues**

The Secretary's failure to evaluate the separation alternative and his grossly defective cost/benefit analysis are further evidence that his decision to hold lease Sale 40 was based on minimum public availability of resource information, minimum public control of resource development and maximum uncertainty as to the return to the public. (See OTA Feasibility Separation, p. 9).

The Secretary's defective cost/benefit analysis is the result of Interior's subordination of his decision-making fiduciary responsibility to the function of serving as the petroleum industry's auctioneer of OCS Sale 40 acreage.* The Secretary's faulty estimates of investment costs, and of production rates and reserves may stem from his failure to evaluate and adopt the alternative leasing strategy of separation of exploration and production that would afford him a more objective and accurate estimate of oil and gas reserves. Such estimate would, in turn, give the Secretary more reliable information with which to determine the valuation of leases and the costs of development and transportation. This information would enable the Secretary to analyze and then realistically compare the costs and benefits of OCS Sale 40 with the alternatives identified by Donkin and Rand. (See Ex. 201, p. 5).

* The consequences of this abdication of responsibility by the Secretary are further illustrated by the findings of a GAO Report issued in connection with the accelerated leasing of OCS Sale 35 tracts in California. GAO Report, "Outer Continental Shelf Sale #35—Problems Selecting and Evaluating Land to Lease" (March 7, 1977). The GAO Report found that the OCS Sale 35 oil and gas tracts were selected for leasing by the Interior Department without obtaining adequate information to determine their potential resources. This, coupled with the pressure to lease a predetermined number of acres, resulted in selecting tracts which the Department believed had little potential for development; deriving unreliable tract values based on inadequate data; and overestimating revenues for budget purposes by 5 times the actual revenues received because of inadequate information and overly optimistic estimates.

Despite the obvious importance of a carefully documented assessment of the separation alternative, whatever discussion is found in the NEPA documents concerning the alternative of separation of exploration and development is of the same abstract generic character as marks the Secretary's assessment of the environmental impact, tanker/pipeline, CZM, and alternatives issues, and is of no practical value to the Secretary as decision maker and fiduciary of the public resources of the OCS. The NEPA documents utterly failed to evaluate the separation alternative as an aid to federal and local decision makers in the site-specific context of Sale 40, and they failed to evaluate the separation alternative as a means of facilitating resolution of the tanker/pipeline issue, providing essential inputs to the CZM process, insuring an accurate cost/benefit analysis, and assessing alternatives.*

The District Court properly concluded that the Secretary failed to evaluate the option of separation as a means of enabling the Secretary to realistically evaluate the alternatives to OCS Sale 40.

Appellant NOIA's and Federal Appellant's Argument

The Secretary does not have authority to issue separate leases for exploration and development, and thus it was not necessary in the NEPA documents to consider a separation of exploration and development in planning for Sale 40. (*NOIA's Brief*, 47, 48, *Federal Appellants' Brief*, 41, 42).

Answer

Appellants have improperly framed the issue as to whether the OCS grants the Secretary authority in a unitary lease to separate exploration from production.

* In fact, prior to the issuance of the FES-Sale 40, County of Suffolk's special counsel specifically urged the Department of the Interior to consider separation of exploration and production in the Mid-Atlantic region. (Ex. 83) The request was ignored.

First, there is no language in the OCS statute which denies the Secretary authority to enter into a lease which conditions production or development rights on a further determination by the Secretary, based on the results of prior exploration, that such development and production will not result in undue environmental damage. The OCS statute must now be read together with NEPA to give environmental protection equal parity with the need to develop OCS resources.

Section 5 of the OCS Act provides:

The Secretary shall prescribe such rules and regulations as may be necessary to carry out the leasing provisions of the Act, including regulations on the suspension of operations or production. (43 U.S.C. S. 1334(a)(1))

This "necessary" rulemaking power of the Secretary gives him the authority to infuse NEPA's requirements into the OCS leasing system and to incorporate appropriate environmental protection clauses into OCS leases, including provisions authorizing the Secretary to terminate leases, if development or production may cause significant environmental damage, or if the estimated costs of OCS development outweigh the anticipated benefits therefrom.

While the Secretary may not have the authority to terminate an unconditional production lease on environmental grounds, he has the authority under the statute and his rulemaking power to enter at the outset into a conditional lease, reserving the power to terminate such lease on specified grounds related to his review of the data obtained from a separate stage of exploration.

The OCS Act and its implementing rulemaking power, read together with NEPA, also give the Secretary authority to separate exploration and production through a sale of exploration rights, followed by a separate sale or production leases. No one seriously questions the Secretary's

right to contract with third parties (not necessarily oil companies) for the sale of exploration rights and for the Secretary's purchase of exploratory data to be used by the Secretary to carry out the leasing provisions of the OCS Act, and the environmental protection purposes of NEPA.

Moreover, as was stated in *NRDC v. Morton*, 458 F. 2d 827, 3 ERC 1558, 1564 (D.C. Cir. 1972):

"The mere fact that an alternative requires legislative implementation does not automatically establish it as beyond the domain of what is required for discussion, particularly since NEPA was intended to provide a basis for consideration and choice by the decision-makers in the legislative, as well as the executive branch."

The District Court properly concluded that the Secretary failed to evaluate the option of separation of exploration from production, which failure effectively precluded him from realistically evaluating the alternatives to OSC Sale 40.

District Court Finding

F. Failure to Consider Impact of Leasing Alternative Tracts.

NOIA's Argument

The Court below erred under the "rule of reason" in holding inadequate the discussion in the Sale 40 EIS and in the PEIS, of the alternative of selecting different tracts for leasing (*NOIA's Brief*, 48-50).

Answer

NOIA has stated this question in a truncated way which conceals its context in the decision appealed from. Judge Weinstein found that the Secretary failed to consider the

possible impact of particular tract-selection choices on the feasibility and sites of pipelines, and gave no consideration of excluding industry-preferred tracts, or including less highly desired tracts in the final sale offer because of related onshore impacts and developments (Op. 7, 8) (JA 29, 30). The Secretary gave no consideration whatsoever to the relationship of the selected tracts to specific pipeline routes, onshore impacts, or local zoning and related powers, or to the probability that even if the states do not prohibit pipelines, they may restrict their point of entry (Op. 71-73) (JA 94-96).

II. Other Alternatives and Socio-Economic Impacts Not Considered by the Secretary.

At the hearings before the district court, evidence was presented which disclosed that the decisions to accelerate OCS leasing and hold lease Sale 40, irrespective of the outcome of any NEPA review, foreclosed any serious and careful examination of the alleged need for, and alternatives to, OCS Leasing in the Mid-Atlantic Lease Sale 40 area. Although the district court chose not to base its holding on the failure of the Secretary to consider the particular alternatives discussed in this section, there being ample evidence of the Secretary's failure to adequately examine the alternatives already discussed in this brief, a review of these other options which the Secretary neglected to consider will serve to highlight the inadequacy of his compliance with NEPA.

A. Alternative of Increasing Gulf of Mexico Oil and Gas Production Through Efforts to Develop and Produce Reserves on: Producing Shut-in Leases; Non-producing Reservoirs; Drilling New Wells in Currently Producing Oil and Gas Reservoirs; Increasing Production from Existing Production Wells up to Levels Approximating Their Respective MPR's (Maximum Production Rates).

Mr. Donkin testified that there were superior alternatives to holding OCS Sale 40. These alternative sources of oil and gas include non-producing leases in the Gulf of Mexico at which gas reserves have already been drilled and discovered, non-producing gas reservoirs at producing leases in the Gulf, producing reservoirs in the Gulf of Mexico, both oil and gas, which currently are not being produced at anywhere near their maximum predictive capacity, plus an extremely large inventory of leases not included in the preceding categories, many of which have not yet been subjected to exploratory leasing (JA 943, 944).

Donkin testified that development in the Gulf of Mexico is not taking place at the optimum level and that holding OCS Sale 40 in August 1975 would exacerbate the problem (JA 947). There are many new, recently acquired leases in the Gulf of Mexico, significant discoveries being announced frequently, as for example a tract acquired in May 1974, which may be the Gulf's largest oil and gas field (JA 947, 948). The combination of newly acquired leases, 1700 active leases in the Gulf of Mexico, and unleased acreage, will increase the demand on drilling equipment, platforms, rigs and manpower (JA 948). The holding of lease Sale 40 would place a large drain on the industry's ability to raise capital for both Sale 40 and the Gulf of Mexico activity (JA 948). Donkin stated his opinion that it would be better and more productive to use the \$400 to \$600 million estimated bonuses to be paid on

lease Sale 40 and invest it in physical exploration and production in the Gulf of Mexico, whose oil and gas can be brought on stream at higher levels at much sooner rates, and with more certainty of finding oil and gas reserves than in the Mid-Atlantic (JA 948-951, 959).

On the other hand, as the Court observed, if lease Sale 40 goes through, there would be roughly half a billion dollars frozen into government funds and not presumably in oil exploration or production (JA 951). Donkin put it succinctly:

"I am suggesting that we would in all probability develop far more oil and gas, and much sooner, in the Gulf of Mexico for equivalent expenditure where we simply were to continue to develop the non-producing—the producible shut-in reserves and leases, reservoirs and leases, and increase production at producing reservoirs were (sic) appropriate up to levels approximating the maximum desirable rate of production." (JA 951). See also (JA 960, 961).

Donkin indicated that there was no pressing need for Sale 40 and that under his analysis of the alternatives, the decision to lease Sale 40 could be postponed 3-5 years (JA 951-952).

In response to questions from the Court, Donkin testified that the alternative of separation of exploration and production was a viable superior alternative to holding lease Sale 40 at this point (JA 952-954) and that instead of tying up a half billion dollars of capital for lease Sale 40, if the government (or anybody) laid out a hundred million, they could, at a cost of \$3 million per well, drill about 30-45 exploratory wells and explore the Sale 40 area and obtain a pretty good idea of its potential (JA 950-953).

"It seems to me that it would be far superior to have the government drill maybe 15 to 30, 35 wells out there

and get a pretty good idea as to what in fact the potential is than to lease it in this point of time." (JA 953)

Donkin also described as a viable alternative, that the government could purchase the seismographic, geological and geophysical data, and interpret it, or contract out to other consultants who interpret such data, or the government could contract out to the drillers and, based upon the results of the initial drilling, make a determination as to where for example, if at all the ultimate reserves lie relative to the range of estimates contained in the PDOD (JA 954-955).

Donkin stated that the PDOD-Sale 40 did not discuss the most useful way of using the half billion dollars at this point and that it did not consider the alternative of additional development in the Gulf versus frontier areas. Furthermore, Donkin pointed out that the Sale 40 PDOD did not address the impact that Sale 40 would have on the capital necessary to develop the Gulf of Mexico, the on-shore fields, to complete the last Canadian pipeline, and things of this nature (JA 958). He also testified that the Programmatic PDOD didn't consider the possibility of enhancing the Gulf of Mexico production at all (JA 955).

Donkin testified that the Secretary of the Interior could not make an intelligent decision based upon the documents that he had, and that a reasonable set of alternatives understandable by a lay person could have been put together with the data now available for presentation to a decision maker (JA 956-957).

With regard to natural gas, Donkin testified that there were shortages at existing prices, and curtailments, but that it was not of crisis proportions. He stated that the recent FPC increase in the price of new gas would increase its supply and that there would be significant increases in

production in the near term if producible shut-in leases were brought on-stream, and if new well completions took place (JA 955-956).

He made an extremely conservative estimate of 6 trillion cubic feet of reserves relative to producible shut-in leases, and that from the 2 sources—producible shut-in leases and the nonproducing dedicated reservoirs, there will be roughly one trillion cubic feet a year during the first year, or 2.7 million cubic feet per day (i.e. 2739 MMCF) (JA 968-969).

Donkin testified that the amount of daily deliverability of natural gas from the offshore Louisiana producible shut-in leases and non-producing gas reservoirs which are dedicated to interstate pipelines would account for 5040% of Transcontinental Gas Pipeline Corp.'s projected deficiency during the winter heating season, November 1976 through March 1977 (JA 970). (Transcontinental is the company which serves the New Jersey and New York area (JA 967) and the intervenor gas industry.)

Donkin further testified that he made a comparison of the expected gas yield from OCS lease Sale 40, and his calculations of what could be yielded if the producible gas at producible shut-in wells and dedicated reservoirs were brought up to optimal utilization were as follows:

"If the gas reserves estimated for Sale 40 are at the low end of the range, then the offshore producible shut-in leases and non-producing reservoirs would account for approximately 317,000—or 317 percent of the peak daily capacity to be attained in 1989 for Sale 40. At the high end of the range for Sale 40, the Gulf of Mexico leases would account for 87 percent of that figure." (JA 971-072)

As a further means of dealing with the natural gas shortfall, Donkin testified that if the low priority intra-

state use were devoted to the high priority industrial—or higher priority industrial and home use, that much of the shortfall would be overcome. He said that if natural gas service to generate electricity were either ceased within the near future or phased out, that would free up rather large volumes of gas to serve the higher priority uses, and it would probably eliminate all curtailments, and if the price of gas were raised up to the alternative fuel cost, it would have the effect of phasing out the use of natural gas to generate electricity (JA 973-976).

Offshore Oil & Gas Alternatives Not Considered

Mr. Donkin's testimony was documented in considerable detail by Plaintiff's Ex. 73 (JA 3314-3340).

<i>Subject</i>	<i>Exhibit Citation (Page)</i>
Active OCS oil and gas leases	6
Producible shut-in leases	17
Relative magnitude of reserves associated with producible shut-in leases in Gulf of Mexico	21
Estimated gas reserves	22
Comparison between OCS Sale 40 estimated gas reserves and those from producible shut-in leases	23
Evidence that production from existing offshore leases in the Gulf of Mexico could be significantly enhanced	27
FPC study of extent to which production from non-producing offshore reserves could be accelerated	29
Evidence that Gulf of Mexico OCS oil and gas production from currently producing reservoirs could also be enhanced	31
Large gap between actual production and MER and MPR	31-41

<i>Subject</i>	<i>Exhibit Citation (Page)</i>
Gap indicates that through additional development drilling production from the OCS could be dramatically accelerated within a short period of time..	41
Estimated costs of increasing MER level of production from the current level of production	45
Benefits of accelerated production through developmental drilling would greatly exceed the incremental costs of that activity	48
Estimates of acceleration in production capability, measured in terms of additional MPR that would obtain if new wells were completed in selected reservoirs in 4 producing areas of the Gulf of Mexico	50
Increase in OCS production resulting from efforts to develop and produce reserves on	
(A) Producing, shut-in leases	
(B) Non-producing reservoirs	
(C) New wells in currently producing oil and gas reservoirs	
(D) Increase in production from existing wells up to levels approximating their MPR's would be greater than the increase in OCS production which might derive from Sale 40	53
The alternatives to Sale 40 would result in accelerated OCS production taking place sooner than were petroleum and natural gas to be found in commercial quantities in the Mid-Atlantic	54

<i>Subject</i>	<i>Exhibit Citation (Page)</i>
It is possible that not holding Sale 40 will result in greater levels of domestic production between now and 1985 than would obtain were the sale to be held as scheduled	56
Accelerated offshore leasing in the Mid-Atlantic will exacerbate the problem of insufficient development activity in other OCS areas	59
Speculative withholding of natural gas supplies in anticipation of future price increases motivates deferral of development and/or production from existing supplies	60
The Programmatic PDOD did not present an adequate assessment of the future energy potential of conventional onshore petroleum sources	63

Onshore Oil & Gas Alternatives Not Considered

The trial testimony of Donkin at the final hearing further analyzed onshore oil and gas alternatives whose potential was not adequately assessed by the Secretary in the FES-Sale 40 or in the PDOD (JA 1862L). Onshore areas of the United States contain potential gas supplies substantially in excess of the Secretary's reserve estimate of 9.4 trillion cubic feet for the Sale 40 area (JA 1862M) which can be developed with less possibility of harm to the environment (JA 1862M).

The FES-Sale 40 did not evaluate as alternatives:

- 1—the onshore capabilities in the event that natural gas prices are deregulated or, alternatively, that natural gas prices are increased substantially under continued regulation; (JA 1862M, 1867-1869)
- 2—the onshore potential from secondary and tertiary recovery of oil in the event that old oil price controls applicable to such oil are removed; (JA 1862N, 1870)

3—the alternative of investing the sums of money that would otherwise be paid for purchasing, exploring and developing Sale 40 acreage and developing instead the existing onshore oil and gas reserves which have the benefit of being in large part located in currently producing fields, with many of the natural gas pipelines and some oil pipelines now connected to fields that are operating at substantially below their rated capacity, so that new supplies of oil and gas could be quickly developed in those onshore areas; therefore, not only is the resource based onshore greater and of a greater potential than the Sale 40 acreage, but the onshore reserves can also be brought on to production faster and with lower investment costs, because in most instances, no new pipelines would be required, and gas processing plants are already located in those fields. (JA 1862P)

The fact that the onshore alternative can produce needed natural gas supplies more quickly, at less investment cost and with less environmental damage than OCS Sale 40, whose prospects are uncertain, is a forceful and welcome reminder of the wisdom of the NEPA requirement which obligates the decision maker to consider and weigh the alternatives.

The NEPA documents should have but failed to consider and weigh the alternative of developing the potential onshore reserves to determine if that alternative is preferable from the standpoint of the consumer of natural gas and more in the public interest than Sale 40.

The Secretary failed to consider whether alternative development of onshore reserves would reduce the rates that consumers would ultimately be charged because no new pipelines would be required as in the case of Sale 40, and any additional throughputs in existing facilities would reduce the cost of a service on a basis unit (JA 1862P-1862Q).

The evidence presented by Donkin proves conclusively the utter failure of the Secretary, in violation of NEPA, to carefully consider and evaluate 1) the need for OCS Sale 40; 2) alternative sources of oil and gas supply in other domestic areas within his jurisdiction and authority; and 3) the effect of opting for OCS Sale 40 without analyzing its effect on Gulf of Mexico production, and without making a cost-benefit comparison for the purpose of assessing the relative priorities to be assigned by OCS Sale 40 as compared to the alternatives described by Donkin.

The alternatives described by Donkin were alternatives within the jurisdiction of the Secretary, whose effect can be reasonably ascertained and whose implementation was not remote and speculative. Failure of the NEPA documents to set forth the Donkin alternatives precluded the Secretary from considering a range of alternatives sufficient to permit a reasoned choice, and constituted a violation of NEPA.

B. Additional Domestic Energy Sources Not Considered.

At the hearing for the permanent injunction, Rand's testimony documented the availability of the following alternative energy sources:

- 1) Alaska North Slope crude surplus (JA 1479-1484, 1487);
- 2) Naval Petroleum Reserves—Santa Ynez deposits (JA 1479, 1487-1491, 1501);
- 3) Heavy oil reserves—Santa Ynez deposits (JA 1479, 1491-1492, 1504).

C. The Alternative of Conserving OCS Sale 40 Oil and Gas Resources as a Strategic Reserve for Further Use, Rather Than Using it Up Now.

In his affidavit (Ex. 72), Dr. Daniel Newlon said that the PDOD made a static and misleading comparison of the

sum of the price and the environmental costs of OCS oil with each of the major substitute sources of energy (e.g. oil imports), and with the cost of energy conservation, because the comparison did not consider the implications of resource use now for future resource availability. In other words, the PDOD failed to consider the crucial question—Will oil from the OCS be more valuable now, or will it be more valuable to the U.S. consumer at some time in the future? (Ex. 72, pp. 3, 4).

Dr. Newlon testified that insufficient consideration was given to the possibility that in making the decision regarding OCS leasing, the Secretary should:

“... at least consider this possibility that we are being spendthrift, that we should postpone and lease at a later date.” (JA 925-926).

He testified that inadequate analysis was made. Dr. Newlon made these points:

- a)—The PDOD did not discuss the uncertainty and the range of opinions that exist about the different projections it was discussing (JA 914);
- b)—The PDOD's discussion of the conservation option was misleading (JA 914);
- c)—The PDOD did not address the existence of the OPEC and the option of using the OCS as a standby production capacity—an oil weapon—to deter price increases and embargos in the future (JA 914);
- d)—The PDOD's conclusion that OCS oil would be cheaper than energy from alternative sources completely left out the future (JA 915);
- e)—The PDOD failed to discuss the cost to future generations of using up an exhaustible OCS resource now (JA 915);

- f)—The PDOD failed to compare the profits that would be secured in the future from holding the oil off the market, with the profits to be secured right now from OCS development (JA 916-917)—a comparison which should have been made by a prudent administrator charged with the administration of a public resource (JA 917);
- g)—The PDOD's conclusion that the cost of energy conservation is greater than the cost of producing from the OCS is misleading and wrong (JA 918); it does not disclose the basis for the Secretary's decision, nor of his evaluation of the energy conservation option and its feasibility (JA 918-921);
- h)—The PDOD failed to deal with the future, and failed to consider the future costs of energy conservation and how the economy can adjust over a future period to energy conservation and to a gradual constriction in the supply of energy (JA 922-924);
- i)—The PDOD failed to evaluate how energy conservation, combined with development of alternative fuel sources, could reduce the energy deficit to the point where the Secretary might say "it's better to keep this for future reserve than to use it up now";
- j)—The PDOD is based on the erroneous assumption that OPEC does not exist, that "we can accelerate the leasing of oil or we can hold the oil—hold back supplies and it will have no impact on future prices" (JA 926);
- k)—The PDOD fails to evaluate the scenario that it is politically and economically infeasible to be completely self-sufficient (JA 926-927), *that is, a scenario of rapid development* of the outer continental shelf and rapid production from the OCS may

leave the United States still vulnerable to cuts in oil consumption (JA 928-929);

- l)—The PDOD failed to evaluate the alternative (presented by Dr. Newlon in the CEQ hearings (Ex. 71) of exploring the OCS, developing standby production plans, but with leasing for production contingent on future increases in the real price or a decrease in the security of oil imports (JA 930-931). Newlon affidavit, Ex. 72, pp. 5, 6; ("The Oil Security System: An Import Strategy for Achieving Oil Security and Reducing Oil Prices") (Ex. 69);
- m)—The PDOD gives the illusion of an analysis, and an illusion of a cost-benefit comparison, but does not set forth the actual considerations that entered into the decision making process (JA 933);
- n)—A prudent administrator charged with the administration of the public resources of the OCS lands, to the extent that he used the PDOD as a document upon which his decision was based, would not be justified in making a decision to accelerate OCS leasing and in particular making a decision to hold lease Sale 40 (JA 933-934);
- o)—The PDOD is an integral part of the impact statement and the EIS can't be understood without considering the PDOD (JA 932). As Newlon put it:

"I think that in something as important as leasing on the outer continental shelf, where there are security issues, where there are environmental issues, where there are substantial economic issues, that there should be a document that describes the decision making process on which—and justifies the decision that's been reached." (JA 936-937)

p)—The Programmatic PDOD does not provide analytical basis for accelerating the OCS, and it really obscures the issues about why the Secretary would or would not consider a certain option (JA 938);

q)—If we had reasonable price regulations, a lot of the shortage in natural gas would disappear; and if the price increase didn't bring additional supplies, it would bring a reduction in demand that would bring demand in balance with supplies (JA 941, 942).

In sum, Newlon concluded that the PDOD is an inadequate review of the alternatives to accelerated leasing of the OCS because its comparisons are static and not dynamic, it fails to consider the implications of leasing policies for monopoly power, and it neglects the contingent leasing option.

George Donkin also concluded that PDOD's discussion of the perceived problem of insecure and expensive oil imports was inadequate. He observed that the PDOD discusses possible solutions to the oil import problem within a static or short term context, as opposed to addressing the issue in terms of a secular or long-term perspective. By so doing, the PDOD ignores the problem that *if we accelerate production from the frontier areas of the OCS now, those areas may be depleted later, when needed as much or even more*. To that extent, accelerated OCS production will make imported oil increasingly "insecure and expensive" over time (Ex. 73, p. 70) (JA 3377).

Donkin found that the Programmatic PDOD did not consider the option of utilizing the OCS as a form of energy reserve as a safeguard against even more expensive or insecure imported oil in the future, and that the PDOD failed to base the decision to accelerate OCS leasing on a complete assessment of both short term and long term com-

parisons of OCS production against all of the relevant alternatives (Ex. 73, pp. 71, 72) (JA 3378-3379).

Thus, under the assumption that conventional domestic petroleum production from non OCS lands will, over time, account for an even smaller percentage of our total energy consumption, maximizing OCS production through accelerated OCS leasing may in fact be increasing our ultimate dependence upon imports in the future (Ex. 73, p. 72) (JA 3379).

D. The Alternative of Energy Conservation.

Newlon

Dr. Newlon pointed out the PDOD's static and misleading comparison of the cost of accelerated OCS leasing to the cost of energy conservation, and its erroneous conclusion that mandatory conservation was not a desirable alternative (Ex. 72).

Donkin

Donkin also concluded that the PDOD's comparison was based on a deficient analytic foundation because it erroneously compared \$1-\$7 per barrel costs of OCS oil with \$11-\$12 price for non-OCS oil, and failed to take into account that the existing \$11-\$12 price of oil is a function of current, as opposed to future, demand levels, which demand would be reduced by effective conservation measures. Therefore the PDOD should have appropriately compared not OCS production vs. \$11 oil today, but rather OCS production vs. some combination of energy conservation and increased production from non-OCS energy sources (Ex. 73, pp. 67, 68) (JA 3375, 3376).

Ross

In his affidavit (Exs. 78, 79), Prof. Marc Ross states that fuel conservation is the best energy policy for simultane-

ously stretching out our limited fossil fuel resources, holding down total energy costs, minimizing dependence on foreign energy sources and protecting the environment (Ex. 78, pp. 1, 2). This estimate of the potential for fuel conservation was greater than the estimates in *Energy Alternatives: A Comparative Analysis* (the reference relied on in the FES-Sale 40) and he concluded that said reference was obsolete and not a useful reference on the subject of the potential for fuel conservation (Ex. 78, p. 2).

Dubin

The affidavit of Dubin (Ex. 77) (JA 2967-2973) found that the Program FES and the Sale 40 FES did not make an adequate evaluation of the alternatives of energy conservation and solar energy, and that their potential was far greater than presented—a potential which could be quantified by meaningful energy conservation study of the scope described in his affidavit. Absent such study, the BLM cannot truly say that it adequately evaluated the alternatives of energy conservation and solar energy.

A recent decision of the U.S. Circuit Court of Appeals for the District of Columbia, *Aeschliman et al. v. United States Nuclear Regulatory Commission, et al.*, 547 F.2d 622 (D.C. Cir. 1976), illustrates the importance of agency consideration of this alternative. In *Aeschliman*, the Court held defective an EIS which failed to examine energy conservation (including measures for reducing consumer demand) as an alternative to constructing two nuclear power plants to generate electricity and steam.

The Court set forth the nature of an agency's NEPA obligation to assess alternatives (such as energy conservation) to the proposed action and restated some of the standards which comprise the test of adequacy of the EIS regarding consideration of alternatives.

The Court stated:

" . . . An alternative cannot be ignored simply because it would not totally alleviate the need for a proposed facility.

. . . 'Nor it is appropriate, as Government counsel argues, to disregard alternatives because they do not offer a complete solution to the problem. If an alternative would result in supplying only part of the energy that the (proposal) would yield, then its use might probably reduce the scope of the . . . program and thus alleviate a significant portion of the environmental harm attendant on it). *NRDC v. Morton*, 458 F.2d 827, 836 (D.C. Cir. 1972)'." *Aeschliman, et al. v. United States Nuclear Regulatory Commission, supra*, 547 F.2d at 627.

E. Socio-Economic Impacts.

In addition to the preceding alternatives which the Secretary did not consider, evidence was brought forth concerning socio-economic impacts occasioned by accelerated OSC leasing and lease Sale 40. This evidence, too, confirms the District Court's finding that the Secretary failed to adequately discharge his NEPA obligations.

The decision documents failed to evaluate the anti-competitive impact of accelerated OCS leasing and lease Sale 40, thereby violating the NEPA requirement that the EIS disclose "any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented".

The complaint, paragraph 22 (p. 24) alleges that the FTC has filed a proceeding charging the major oil companies with anti-competitive practices.

The answer (paragraph 22d, p. 5) admits this allegation.

The complaint, paragraph 23 (p. 24) alleges that the FTC proceeding and reports were known to the Secretary

and that he made no reasonable effort to determine its relationship to the OCS leasing program.

The answer (paragraph 24, p. 5) admits that the FTC staff report was reviewed by the BLM in preparation of a background analysis for the Department's proposal in early 1974 to ban certain joint-bidding for OCS leases.

In its answer (pp. 26-28) to plaintiffs' interrogatories 15J, N, O, P, S, T, U, V, W, X (pp. 39-42), defendants admitted that no studies were made by or in behalf of or relied on by the Secretary as to the anti-competitive impacts of accelerated OCS leasing.

We stress the importance of these interrogatories and answers as bearing on the Secretary's utter failure to grasp and consider these critical socio-economic effects of accelerated OCS leasing and their implications for assessing the supply/demand factors and need for, alternatives to, and environmental costs of, accelerated OCS leasing.

These matters were within the awareness and cognizance of the Secretary, as evidenced by the partial steps taken by the Secretary to deal with the problem of joint bidding for OCS leases. However, he failed in his critical responsibility of evaluating somewhere in his decision documents, the anti-competitive impacts of accelerated OCS leasing. That these were perceived to be real is established by the FTC March 1976 letter (Ex. 75) (JA 2953-2956) sent in response to the Court's order directing distribution of the Program PDOD to the Justice Department and the FTC. The FTC letter found that accelerated OCS leasing would have anti-competitive effect. Yet, as the deposition of Frank Basile shows (JA 1961-1963) and as is clear on the face of the FES-Sale 40 and PDOD-Sale 40, no evaluation was made of the FTC staff comments. Nor was any evaluation made of the Rand critique (Ex. 84) (JA 2979-3000) which dealt with related matters, and was

forwarded by special counsel for the County of Suffolk to Interior prior to preparation of the FES-Sale 40, and the PDOD-Sale 40.

It is clear that from the very inception of this case, the Secretary was put on notice via the complaint and interrogatories of the anti-competitive impact issue, but failed to evaluate it as part of the decision making process.

The Secretary's disregard of the FTC comments violated NEPA Sec. 4332(C), and his failure to evaluate the dissenting views brought to his attention before preparation of the Sale 40 decision documents violates the rules laid down in:

Committee for Nuclear Responsibility v. Seaborg,
463 F.2d 796 (D.C. Cir. 1971);

Environmental Defense Fund v. Corps (Gillham Dam), 325 F. Supp. 728, 759, 1 ELR 20130, 20141 (E.D. Ark. 1970-71);

Environmental Defense Fund v. Corps of Engineers, 348 F. Supp. 916, 933, 4 ERC 1408 (N.D. Miss. 1972).

See also *Council on Environmental Quality Guidelines*, 40 C.F.R. Section 1500.10(a) which requires that

"where opposing professional views and responsible opinion have been overlooked in the draft statement and are brought to the agency's attention through the commenting process, the agency should review the environmental effects of the action in light of those views and should make a meaningful reference in the final statement to the existence of any responsible opposing view not adequately discussed in the draft statement, indicating the agency's response to the issues raised."

Following the lifting of the stay on Sale 40, the Secretary, on August 17, 1976, held the lease sale.

The bids received by the Department of the Interior for Sale 40 indicate that several major oil companies—Exxon, Mobil Oil, Texaco, Gulf, Shell—were high bidders for a substantial portion of the lease sale acreage (United States Department of the Interior, Bureau of Land Management Report-11) (High Bid Recap By Tract August 19, 1976). These are the same companies who have been charged by the Federal Trade Commission with anti-competitive conduct in the pending proceedings described in the County's complaint, paragraph 22.

The Secretary's failure to assess the anti-competitive impact of accelerated OCS leasing produced the very result reported by the Federal Trade Commission when it advised the Secretary that accelerated OCS leasing would have an anti-competitive impact. Ownership and control of a significant share of lease Sale 40 public oil and gas resources was transferred to private vertically integrated major oil companies whose anti-competitive conduct is the subject of FTC proceedings.

NEPA Section 4332(C)(v) requires that an EIS disclose any irreversible and irretrievable commitments of resources which would be involved in the proposed action should be implemented.

NEPA Section 4332(2)(D) requires the Secretary to "study, develop and describe appropriate alternatives to recommended courses of action to any proposal which involves unresolved conflicts concerning alternative uses of available resources".

The Secretary's August 17, 1976 lease sale, without the required prior NEPA assessment of anti-competitive impact and alternatives, resulted in an irreversible and irretrievable commitment of public-oil and gas resources to private oil companies. If the leases are reinstated, they may not be terminated except through condemnation and payment of appropriate compensation to the oil company lessees.

No argument is advanced by any of the Appellants that the Secretary was not under a duty to evaluate the anti-competitive impact of accelerated OCS leasing and lease Sale 40. Since the Secretary's leasing decisions caused a primary impact on the physical environment, it became incumbent upon him to adequately assess such socio-economic effects as the anti-competitive impact. His failure to do so gives additional grounds for affirmance of the District Court's decision.

Chelsea Neighborhood Associations v. U.S. Postal Service, 516 F.2d 378, 388 (7 ERC 1957) (2d Cir. 1975);

Hanly v. Mitchell, 460 F.2d 640, 647 (4 ERC 1152) (2d Cir. 1972); *cert. denied* 409 U.S. 990 (4 ERC 1745) (1972).

III. The Prior OCS and Public Lands Cases are Distinguishable.

Appellants argue that the District Court ignored prior OCS and public lands cases in reaching its decision to invalidate the Secretary's leasing of Sale 40 lands. They place particular reliance on *Sierra Club v. Morton*, 510 F.2d 813 (5th Cir. 1975) and cite to it repeatedly in many of their attacks on Judge Weinstein's decision. Neither MAFLA nor the other cases cited by Appellants controls the case at bar. The primary distinguishing factor present in this case, not found in any of the OCS and other cases, is the depth and comprehensiveness of the District Court's inquiry and findings which revealed that the Secretary had failed totally to discharge his NEPA obligations. In marked contrast to the case at bar, previous OCS and public lands cases are sharply distinguishable, procedurally, substantively, and on their facts.

1. ***Sierra Club v. Morton (MAFLA)*, 510 F2d 813 (5th Cir. 1975)**

In this case the District Court found the EIS to be sufficient under NEPA requirements and the decision to proceed on the basis thereof to be reasonable. The Appellate Court affirmed.

This case is immediately distinguishable with regard to the burden of persuasion. The government won in the court below and the burden was on the appellants (plaintiffs-environmentalists) to convince the Fifth Circuit Court of Appeals to reverse. In the instant case, appellees-plaintiffs won in the District Court, and it is the government and other defendants who are appealing. It is their burden to persuade this Court that the decision of the District Court, based as it was, on a fact intensive record, should be reversed. They cannot meet this burden.

A second important distinction is the geographical area of the OCS sale. MAFLA involved lease sales between December 27, 1973 and January 18, 1974 in the Gulf of Mexico. This is an area already extensively drilled for oil and gas with a history of the effects in previous Gulf operations of gas leaks, oil spills and other pipeline accidents which the Court took into account in determining the sufficiency of the EIS analyses of possible environmental hazards from pipeline location, construction or leakage (*Id.* at 824). The Court also knew of the prior history of federal-state consultation regarding planning of safeguards for the construction and operation of onshore pipelines and facilities (*Id.* at 824). The Court noted, "These states have been forewarned by the EIS of the possible harm that may result from unrestricted construction and operation" (*Id.* at 824). The Court also found that the EIS disclosed the history of success and failure of similar projects (*Id.* at 824). Taking past history into account, the Court concluded that the detail presented was sufficient to uphold the MAFLA EIS.

The instant case is in dramatic contrast to MAFLA. The Mid-Atlantic lease Sale 40 area is a frontier virgin area with no history of prior OCS oil and gas activity. No offshore pipelines have been constructed in this area. Mid-Atlantic OCS conditions are stormier and more formidable than Gulf of Mexico operations. The coastal zone region is much more densely populated and developed than the Gulf region and the potential conflicts in resource use more sharply defined. The Secretary lacks for the Mid-Atlantic a comparable prior OCS track record and he did not present in the Sale 40 EIS site-specific pragmatic empirical data, available to him, as was disclosed in the MAFLA EIS. Even if he had done so, the level of detail which may have been sufficient in the MAFLA EIS was not sufficient for the Sale 40 EIS.

A third distinction between MAFLA and the case at bar concerns the Secretary's treatment of alternatives.

In MAFLA the Secretary devoted a 352 page volume solely to an analysis of alternatives (*Id.* at 825). In the instant case Judge Weinstein found the discussion of alternatives scant, conclusory and undocumented (Op. 7, 8) (JA 29, 30).

Although the plaintiffs in MAFLA argued that the EIS should have explored the feasibility of the alternative of selling additional tracts off the coasts of Louisiana and Texas prior to the MAFLA sale (*Id.* at 826), the court observed that the plaintiffs offered no evidence concerning the relative possibilities (*Id.* at 826, note 36) and that since production in the Western Gulf was already taking place, there was no indication that development of the additional tracts there would incur less hazards than the development of the MAFLA tracts in the Eastern Gulf; the court said that alternatives of equal hazard need not be considered.

On the other hand, the instant case presented extensive live, expert testimony of the alternatives not considered by

the Secretary,* including increasing production under shut-in oil and gas leases in the Gulf of Mexico. Such increased production would yield more oil and gas than anticipated from Sale 40, more quickly and at less economic and environmental cost than would result from Sale 40 operations. This evidence was precisely the type of showing not made in the MAFLA case and it presented alternatives of *lesser* hazard than Sale 40 because the increase of production under existing shut-in leases in the Gulf of Mexico would take place in an environment already stressed by OCS operations whereas new production under Sale 40 leases would cause new environmental harm in a virgin area not previously subjected to OCS drilling and related operations.

Additional vitally important distinctions between MAFLA and the instant case relate to the comparative scope and depth of the issues and evidence. The MAFLA opinion does not indicate that any evidence was presented concerning certain of the closely-linked related issues dealt with in the District Court's opinion, such as the Secretary's failure to consider the impact of state and local exercise of regulatory powers (Op. 9-42) (JA 31-64), the defective cost-benefit analysis of lease Sale 40 (Op. 43-58) (JA 65-80) and the Secretary's failure to evaluate the separation alternative in a site-specific context.

In MAFLA, there was no tanker/pipeline issue similar to that posed by Sale 40. Presumably, tanker/pipeline operations in the Gulf of Mexico are long-established, accepted activities which do not pose the same menace as they do in the congested Mid-Atlantic region of the New York-New Jersey port area and do not evoke the state-local response anticipated for Sale 40.

In the subject case, tanker shipping lanes, including the shipping route of Sale 40 oil to refineries in the New York

* See in particular the testimony of George Donkin (JA 943-976).

Port area would converge at the apex of New York harbor within the New York coastal zone and close to shore, so that an oil spill would be certain to strand on valuable prime beaches and recreation areas used by millions in the New York-New Jersey metropolitan area.*

There was no cost/benefit evidence in MAFLA of the type or magnitude presented by Donkin in the instant case** on which the District Court relied in its finding that the Secretary greatly overstated peak oil and gas production for Sale 40, and significantly understated the cost of such production, thus resulting in a serious lack of consideration of the likelihood and attendant dangers of increased tanker traffic and an overestimate of the net value of the entire project (Op. 7) (JA 29).

A similar challenge was not made to the MAFLA cost/benefit analysis, and the MAFLA EIS did not estimate peak oil and gas production from MAFLA, and did not estimate the cost of such production, including MAFLA pipelines. MAFLA dealt only with plaintiffs' argument that the Secretary should have quantified and assigned dollar values to future environmental effects of MAFLA (*Id.* at 827).

The Court said this was not a *sine qua non* for the MAFLA EIS (*Id.* at 827).

However, as was noted earlier, its language is not applicable to the Sale 40 EIS discussion of cost/benefit. Here the Secretary actually assigned dollar cost figures and quantified the estimated benefits of peak oil and gas production. The District Court found his estimates to be grossly erroneous with the serious consequences described by the District Court (Op. 57) (JA 79).

Thus, the MAFLA case is inapposite on the cost/benefit issue.

* See testimony of DeWitt Davies (JA 1328-1395).

** See Donkin testimony (JA 1833-1862Q).

Nor does it appear from the record in MAFLA, that any evidence was there presented as to the Secretary's failure to adequately evaluate the alternative of separating exploration and production in the site specific context of the MAFLA sale.

In the instant case, the record contained evidence that the Secretary had failed to adequately evaluate this alternative in the site-specific practical and empirical context of Sale 40, as a means of developing information which would enable the Secretary to determine the extent of oil and gas reserves, and their location before granting exclusive rights of production (Op. 58) (JA 81). Such information was vital to any adequate evaluation of the interconnected tanker/pipeline, state-local regulatory power, cost/benefit, alternatives and coastal zone management issues and would allow government at all levels to exercise timely and essential controls over environmental, social and economic impacts, especially those associated with onshore development.

Finally, the language in MAFLA (*Id.* at 828) concerning the Secretary's alleged ability to control future lessor-lessee relationships involving activities over many areas and over many years, and to make informed adjustments is singularly inapplicable to the case at bar. First, as indicated previously, there was already Gulf of Mexico pre-MAFLA oil and gas drilling history—something which is utterly lacking in the totally dissimilar virgin Mid-Atlantic area. Second, it is by no means clear that the Secretary over time made "informed adjustments" which on balance protected the Gulf of Mexico environment. The history of the relationship of the Secretary and the oil and gas industry suggests to the contrary that the petroleum industry dominated the Secretary's decision-making processes.*

Third, the evidence in the case at bar (apparently lacking in MAFLA) seriously questioned the future ability of

* See Robert Engler, Ex. 79 (JA 2957-2966).

the Secretary to control development for ecological reasons.

Expert testimony characterized Interior's Sale 40 baseline studies as inadequate and of no predictive value to assess the effects of future OCS development.**

Thus the rationale of MAFLA, "drill now, study later" was completely undermined insofar as Appellants attempt to apply it to the case at bar.

* * *

All the other OCS cases relied on by Appellants are distinguishable from the case at bar for substantially the same reasons given regarding MAFLA, and may similarly not be used to support appellants' challenge to the District Court's decision.

None of these cases presents a fact-intensive evidentiary record such as the subject case.

2. *State of Alaska, et al. v. Kleppe, et al.*, — F. Supp. —, 9 ERC 1487 (D.D.C., Aug. 13, 1976)

This involved a motion for temporary injunction, with plaintiffs seeking only to delay the sale. It is not clear from the opinion whether an evidentiary hearing was held on the motion for temporary injunction, and if so, whether live witnesses testified or whether the motion was submitted on the basis of uncross examined affidavits or other papers.

By its silence, the opinion indicates that no plenary trial of the issues took place. The court concluded that the plaintiffs, in their motion for preliminary injunction, failed to show a substantial likelihood of prevailing on the merits. In contrast, in the case at bar, the District Court granted plaintiffs' motion for preliminary injunction. In reversing, the Second Circuit simply ruled that there was some doubt whether plaintiffs would succeed on the merits

** See *Brief, supra*, at 50-52.

at the trial. It did not rule, as did *Kleppe v. Sierra Club*, 427 U.S. 390 (1976), that plaintiffs had failed in their burden. Subsequently, after full trial, the District Court granted a permanent injunction in the instant case.

3. *California v. Morton*, 404 F. Supp. 26, 6 ELR 20088 (C.D. Cal. 1975), appeal pending, 9th Cir. No. 76-1431

In their suit to enjoin leasing off the coast of Southern California, plaintiffs apparently presented only one expert witness at the trial, who contended that the program EIS which assesses the accelerated leasing goal, should, but does not

- a) formulate or discuss a leasing schedule according to net benefit criteria or any reasonable criteria, or
- b) discuss and describe reasonable alternative leasing schedules according to any reasonable criteria. *California v. Morton*, *supra*, 6 ELR, at 20090.

Plaintiffs apparently presented no expert testimony as to other issues and did not present evidence challenging the Secretary's site-specific EIS for the California proposed lease Sale 35. The Court dismissed the suit.

The instant case, as we have indicated, is clearly distinguishable because here the plaintiffs made a massive evidentiary record challenging the Sale 40 EIS, whereas the California plaintiffs perfunctorily challenged the Programmatic EIS and not the California Sale 35 EIS.*

4. *Kleppe v. Sierra Club*, 427 U.S. 390 (1976)

Plaintiffs sued in July 1973 to enjoin the Secretary of the Interior from allowing further development of the coal

* Ironically in a G.A.O. Report, March 7, 1977, the California lease Sale 35 procedures of the Secretary were roundly criticized. See *Brief, supra*, p. 54, and footnote appearing thereon.

reserves of the Northern Great Plains Region without preparing a comprehensive EIS on the entire region.

The district court, on the basis of extensive findings of fact and conclusions of law, held that the complaint stated no claim for relief and granted government's motion for summary judgment.

In January 1975, after oral argument, the Court of Appeals issued an injunction against the Department's approval of four mining plans. In June 1975, the Court of Appeals ruled on the merits, and reversed the district court. The Supreme Court granted *certiorari* and later reversed the Court of Appeals for the reasons hereafter given.

The major issue before the Court was whether NEPA requires the government to prepare an EIS on the entire Northern Great Plains region. The Supreme Court ruled that no EIS was necessary because there was no evidence in the record of an action or a proposal for an action of regional scope, and because the district court in fact expressly found that there was no existing or proposed plan or program on the part of the Federal government for the regional development of the area. The district court's findings were not disturbed by the Court of Appeals and remained fully supported by the record in the Supreme Court.

The Supreme Court concluded that the Court of Appeals erred in its factual assumptions and was mistaken in concluding on the record before it that the Federal government was contemplating a regional development plan or program, and that even if a regional program was contemplated, this, in and of itself, was not sufficient to require an EIS under NEPA.

Thus, on a number of points, *Kleppe v. Sierra Club* is clearly distinguishable from the case at bar.

First, *Kleppe v. Sierra Club* was not brought as a challenge to a particular impact statement and there is no EIS in its record.

Second, the Supreme Court, in reversing the Court of Appeals, and reinstating and affirming the judgment of the district court, rested its decision on the fact intensive record and findings of the district court; to this extent *Kleppe v. Sierra Club* actually supports Appellees who similarly rely on the extensive factual findings of a district court.

Third, while in *Kleppe v. Sierra Club* the major issue involved an interpretation of the meaning of the first sentence of NEPA, S. 102(2)(c), the instant case presents no problem of interpretation of NEPA, but rather, its application by the District Court to the facts of a massive evidentiary record, facts which were in dispute as to such issues as the adequacy of the Secretary's cost/benefit analysis, and of his evaluation of alternatives.

5. *Southern California Association of Governments v. Kleppe*, 413 F. Supp. 563 (D.D.C. 1976)

In this case the plaintiffs sued in late November, 1975 in the District Court of the District of Columbia challenging the accelerated OCS leasing program and particularly Sale 35 off the coast of Southern California. Plaintiffs' motion for preliminary injunction was denied, the court expressing serious reservations regarding the propriety of litigating their action in the D.C. forum in light of the earlier case (*California v. Morton, supra*) filed in the Central District of California in which one of the plaintiffs in the D.C. suit had sought to enjoin drilling off the Southern California coast under the accelerated oil leasing program. The D.C. Court ordered the case transferred to the Central District of California pursuant to 28 U.S.C. § 1404(a). The court observed that the issue of *res judicata* and collateral estoppel were involved because

in *California v. Morton, supra*, plaintiffs had similarly requested injunctive relief to halt Sale 35 but that their action was dismissed on November 17, 1975, after trial. Thus the case was transferred to California so that the federal court in that state could pass on such questions.

We have already distinguished the case at bar from *California v. Morton, supra* (*Brief, supra*, at 85). The decision in *S.C.A.G.*, being procedural and whose fate is linked to *California v. Morton, supra*, requires no further distinction.

IV. Injunction is the Appropriate Remedy.

Injunction and nullification of the leases constitute the appropriate remedy given the necessity to (1) implement NEPA's policy, (2) prevent irreversible commitment of resources now being made, (3) prevent substantial risk of irreparable injury to the environment, (4) insure timely and adequate consideration of alternatives and options, the determination of priorities and the course of action that would best serve to further the public interest, and (5) further public disclosure of all data that should or might affect the instant decision and, perhaps, future decision making (Op. 83 et seq.) (JA 106, et seq.).

District Court's Power to Nullify Sale 40 Leases & Grant Injunctive Relief

NOIA's and Federal Appellants' Argument

Judge Weinstein had no authority to declare, and erred in declaring, OCS Sale 40 null and void (*NOIA's Brief*, 60; *Federal Appellants' Brief*, 52).

Answer

NOIA relies on *Union Oil Co. v. Morton*, 512 F.2d 743 (9th Cir. 1975), as authority for its argument that the District Court lacks power under NEPA to declare the Sale 40 leases null and void.

However, *Union Oil*, on its facts and balance of equities bears no resemblance to the instant case.

In *Union* the four plaintiff oil companies were in the process of obtaining a permit for a third floating drilling platform in the Santa Barbara Channel. When a blowout in the first platform caused a huge oil spill, the Secretary of the Interior suspended all activities pending further environmental studies, which, when completed, compelled the Secretary to deny approval for the third platform. The Ninth Circuit held that the Secretary had only the power to suspend and regulate the drilling operations, but not to cancel the leases. The Court in *Union Oil* stated that cancellation of a lease issued pursuant to OCS was proper only where the lessee breached a restriction imposed by the Secretary. *However, the question of the propriety of the initial sale of the lease was not raised, as it was in the case at bar. The sale of the first two leases in Union Oil was not done under the circumstances of the present case, i.e. after a preliminary injunction had been stayed pending a full trial on the merits of the case.* The plaintiffs in *Union*, unlike the lessees here, were operating pursuant to the leases which themselves were not issued pursuant to a defective EIS. The equities in *Union* were on the side of the lessees; they are not in the present case, where the leases were entered into with full knowledge of the OCS Sale 40 litigation and the business risk that such leases might be rescinded, and where no physical intrusions have been made on the land in question and no resources have been discovered.

NOIA then cites *U.S. v. SCRAP (SCRAP I)*, 412 U.S. 669 (1973) as authority for the argument that NEPA does not give the District Court the power to grant injunctive relief (*NOIA's Brief*, 63).

In *SCRAP I*, the Supreme Court held that the district court lacked jurisdiction under NEPA to enter a preliminary injunction against the Interstate Commerce Commis-

sion (ICC) collecting a surcharge with respect to recyclable goods.

NOIA argues that this Court is similarly precluded from granting injunctive relief under the OCS statutory scheme.

However *SCRAP I* does not apply because, as the Supreme Court itself noted in its opinion (*SCRAP I, supra*, 412 U.S. at 662), under the statutory scheme applicable to the Interstate Commerce Commission (49 U.S.C. § 15(7)), Congress had intentionally vested in the ICC the sole and exclusive power to suspend, and withdrew from the judiciary any pre-existing power to grant injunctive relief.

Biderman v. Morton, 497 F.2d 1142 (2d Cir. 1974) is also relied on by NOIA to support its argument that the District Court cannot issue an injunction because this would arm the Secretary with a power not intended to be given by Congress (*NOIA's Brief*, 63, 64).

In *Biderman* the Second Circuit upheld the district court's denial of a preliminary injunction under NEPA restraining municipalities' issuance of construction permits and variances, on the ground that the enabling Fire Island National Seashore legislation did not grant the Secretary authority to interfere with the power of municipalities on the Seashore to enact zoning ordinances or grant zoning variances, and restricted Federal oversight to condemnation. The Court concluded that such municipal action in no sense contravened federal law (i.e. NEPA).

In the case at bar, the injunction was granted to prevent the Secretary from contravening federal law, i.e. NEPA, and hence is obviously distinguishable on the issue raised by NOIA.

No Vested Rights Acquired by Sale 40 Lessees

Appellants' Argument

The OCS Sale 40 lessees acquired vested rights that cannot be disturbed despite the Secretary's violation of NEPA (*NOIA's Brief*, 65).

Answer

The Sale 40 lessees were on notice before they entered into leases with the Secretary of this Court's power to rescind and leases obtained at the scheduled August 17, 1976 sale should it ultimately be determined that the Secretary had violated NEPA, and NOIA's own witness from Exxon admitted his company was aware of the instant lawsuit and that the company's subsequent expenditures and commitments were considered business risks. (JA 116, 117) Furthermore, many of these commitments could be cancelled or hedged if Sale 40 is rescinded or enjoined, and the expenses representing outlays for exploratory data will have continuing technical value to the company irrespective of Sale 40. (Op. 94) (JA 117) In short, the lessees entered into the leases with their eyes open, having had more than adequate warning of the controversial nature of the project and the applicable law.

Under these circumstances, the lessees obtained no vested rights but are in the posture of any other businessmen who gamble on the outcome of transactions whose legality is questionable. By proceeding to hold lease Sale 40 during the pendency of this suit and before the NEPA issues had been resolved at trial, the Secretary also took the business risk that the trial court might decide that he had violated NEPA and rescind the leases.

OCS Lessees Not Indispensable Parties**Appellants' Argument**

The District Court should not have proceeded to declare the sale null and void without the OCS lessees who are indispensable parties. (*NOIA's Brief* 65, note 38)

Answer

The fact that the sale has occurred does not change the propriety of the injunctive relief. Injunction is the proper remedy even after the act takes place, where the performance of the contract, rather than its execution, may be

erred. In *Wyoming Outdoor Coordinating Council v. Butz*, 484 F2d 1244 (10th Cir. 1973) the Circuit Court found that the government's violations of NEPA required that the "performance of (the timber) cutting contracts" at issue be enjoined until "impact statements be issued in accordance with" NEPA. See also *Minnesota Public Interest Research Group v. Butz*, 358 F. Supp. 584 (D.C. Minn. 1973) *aff'd* 498 F2d 1314 (8th Cir. 1974).

NEPA imposed a duty upon non-federal entities, such as the OCS lessees, not to perform, and to cease to perform any particular activity which violates NEPA. Obviously the entry of a non-federal entity into a lease on the basis of an EIS which violated NEPA, is itself an activity which may be undone via judicial nullification of such lease.

It is beyond challenge that one (such as an OCS lessee) in partnership with the federal government, can be enjoined from acting in a certain manner.

Silva v. Romney, 473 F 2d 287, 289-90 (1st Cir. 1973);

Biderman v. Morton, 497 F 2d 1141, 1147 (2d Cir. 1974).

"In such instances, if NEPA is construed to mandate that the requisite agency decision be enlightened by and grounded on an EIS, it is beyond cavil that the court may then enjoin the non-federal actors pending completion of that impact statement. Indeed, were such non-federal entities to act without the necessary federal approval, they obviously would be acting unlawfully and subject to injunction. Cf. *West Virginia Highlands Conservancy v. Island Creek Coal Co.*, *supra*; *Citizens for Clean Air, Inc. v. Corps of Engineers, U.S. Army*, 349 F. Supp. 696, 706 (S.D.N.Y. 1972)" (497 F 2d at 1147).

Since the validity of the Sale 40 EIS was in litigation and not finally determined at the time the oil company lessees

entered into their leases with the Secretary, it is clear that they were subject to the injunctive jurisdiction of the District Court, whether or not they were formally named as parties to the suit.

In *Cherokee Nation v. Hitchcock*, 187 U.S. 294 (1902), the Supreme Court held that the proposed lessees of oil lands need not be joined in suit against the Secretary of Interior to restrain him from leasing oil lands held for the benefit of Indians. While in this case the lessees are not "proposed" but actual, their positions are no different, since in the instant case they did purchase with knowledge of possible nullification by the Courts.

Public rights may be vindicated, although they run counter to contractual rights between the defendant and third persons without having the latter before the Court. Thus, it was held that the National Labor Relations Board had authority to order an employer not to enforce an employer contract with its employees violative of the NLRA, even in the absence of the employees as parties to the proceeding.

In *National Licorice Co. v. Labor Board*, 309 U.S. 350, 365-366 (1940), Justice Stone's decision stated:

" . . . The order does not go beyond those in suits brought by the United States to restrain violations of the Sherman Act, where the injunction was broad enough to prevent the offender from carrying out contracts with persons not parties to the suits. Similarly, in proceedings before the Federal Trade Commission, the order restraining unfair methods of competition may preclude the performance of outstanding contracts by the offender. Such orders have never been challenged because the holders of the contracts were not made parties."

The oil company lessees, for reasons of their own, chose not to seek leave to intervene in the proceedings before the

District Court, although they had ample opportunity to do so, the suit having been commenced in February 1975.

They were members of, or chose to be represented by, NOIA, and also supplied affidavits for NOIA's use and witnesses to testify in NOIA's behalf (Brunjes, of Shell Oil Co.; and Bybee, of Exxon). NOIA intervened on the eve of the preliminary injunction hearings in August 1976. NOIA never raised the issue of third party OCS lessees as indispensable parties to the District Court suit. In fact, NOIA achieved standing in such suit on the basis of its representation that its participation, along with that of the Secretary, was necessary to represent and protect the interests of OCS lessees and others who stood to profit from OCS Sale 49.

As members of the Appellant NOIA, and as contracting parties to the OCS leases with the Secretary, the interests of the OCS lessees were adequately represented by both NOIA and the federal government.

The argument of indispensable parties has no merit at the appellate stage, and would have had no merit had it been timely raised in the District Court.

The consideration of the question of indispensable party at the appellate stage involves weighing the interest of appellees in preserving the judgment of the District Court and the judicial time and energy that have gone into it. Since the indispensable party issue was not raised below, this Court should not entertain it now, and should preserve the District Court's judgment. See *Provident Tradesmen's Bank & Trust Co. v. Patterson*, 390 U.S. 102 (1968).

***The Balance of Equities & the Public Interest
Require Injunction***

NOIA's and Federal Appellants' Argument

The District Court erred in assessing the equities and public interest, (*NOIA's Brief*, 66; *Federal Appellants' Brief*, 54). Under the authority of *Concerned About Trident v. Rumsfeld*, 9 ERC 1370, (D.C. Cir. 1976) injunctive

relief should not have been granted even if the Secretary violated NEPA (*Federal Appellants' Brief*, 55). Private interests will suffer because huge sums have been spent on Sale 40 and large commitments were made. (*NOIA's Brief*, 66, 67) The public interest will suffer because the "energy crisis" will get worse, and future bidding procedures will be undermined. (*NOIA's Brief*, 68, 69; *Federal Appellants' Brief*, 53, 56) The District Court could have shaped a less draconian decree. (*NOIA's Brief*, 69)

Answer

The overwhelming weight of the evidence supports the District Court's finding that injunction is the appropriate remedy if NEPA is to be implemented and if the public interest is to be served.

***Trident* is clearly distinguishable**

In *Trident* the court used a balancing test in evaluating the EIS, and the defects were viewed as relatively superficial and not as gross or fundamental as the gaps narrated by Judge Weinstein. Furthermore, the Navy's decision to proceed was held not arbitrary, unlike Interior's decision on the Atlantic OCS leasing, and there was no questioning the good faith intentions of the Navy. While Judge Weinstein declined to rule explicitly on the good faith issue of the Secretary of the Interior, he did note a great deal of circumstantial evidence that could indicate that the Secretary's efforts in the EIS process were a "charade" and that the decision lacked good faith.

Furthermore, in the case of the Navy base, certain immediate site impacts had already occurred. The *Trident* site was also an expansion of an already existing base. On the Atlantic OCS program, no physical activity has taken place by the government that need be uprooted, and thus the equitable considerations are less in evidence. This matter goes to the distinctions between the two situations regarding the magnitude of impacts and the extent of reversibility of resources commitment. The Navy has a

primary role in national defense; Interior, on the other hand, is responsible for the protection of the nation's natural resources and subsequent careful development.

In the *Trident* case Judge Leventhal pointed out that the *Trident* decision-making process was already under way when NEPA was enacted, a fact not present in the instant case. It was controlling to the issue of injunctive relief that further delay might injure the nation's defense posture. In fact, Judge Leventhal's conclusion of the possibility of some damage to strategic interests put the *Trident* case in a different category from litigation concerning non-strategic actions such as rivers and harbors projects of the Corps of Engineers.

Thus, critical to the *Trident* decision was the relationship between NEPA and national defense. While strategic military decisions are not exempt from NEPA per se, they will be more persuasive than in the case of non-strategic proposals. At bottom, the decision in *Concerned About Trident* can be viewed as supportive of the District Court's decision here that NEPA violations cannot be overlooked.

Appellants' business gamble

In direct response to Appellants' stress on the costs incurred by the lessees to date, this Court is referred to the decision of *Steubing v. Brinegar*, 511 F2d 489 (2d Cir. 1975), in which the Court of Appeals, in spite of similar arguments, held that "... compliance with NEPA invariably results in delay and concomitant cost increases, and Congress has implicitly decided these costs must be discounted". The District Court more than merely acknowledged the interests of the lessees in this case. It noted, however, that the lessees purchased with full knowledge of the possibility that a court could declare the sales invalid, as one did enjoin them in the first place. (Op. 92) (JA 115)

There was no proof by appellants in the Court below that Sale 40 would relieve the so-called "energy crisis"

or that it was preferable to any alternative as a means of developing energy supply. In fact, the testimony of Donkin established without contradiction that there were viable alternatives which were superior to Sale 40 and which were never considered by the Secretary.*

"Energy crisis" no excuse for violating NEPA

In any event, Appellants' cry of "energy crisis" as justification for the Secretary's disregarding the mandates of NEPA, is one that has been heard before by appellate courts and roundly dismissed.

Federal courts have not hesitated, where inadequate impact statements have been filed, to enjoin proposed action regardless of the ominous reference by the Government to issues of "national energy crisis" or "national defense".

NRDC v. NRC, 539 F2d 284 (2d Cir. 1976);
NRDC v. Morton, 485 F2d 827 (D.C. Cir. 1972);
NRDC v. Callaway, 524 F2d 79 (2d Cir. 1975);
Calvert Cliffs' Coordinating Committee v. AEC,
 449 F2d 1109 (D.C. Cir. 1971).

No proof re-bidding will result in lower lease payments

In answer to Appellants' argument that the injunction undermines future bidding, the District Court concluded that there was no evidence adduced at either hearing that re-bidding will result in lower payments than were obtained previously, and that rescission of the leases will not, therefore, disserve the public in this respect. (Op. 95) (JA 118)

Injunction Necessary to Insure Accurate Cost-Benefit Analysis, to Prevent Foreclosure of Alternatives & Options & to Prevent Irreversible Commitments

NOIA's and Federal Appellants' Argument

The District Court gave no thought to directing the Secretary to prepare a subsequent EIS on the production

* See *Brief, supra*, 58-67.

phase itself to insure that pipeline corridors are studied in an EIS before transportation decisions are made and pipelines are actually laid. (*NOIA's Brief*, 69, 70; *Federal Appellants' Brief*, 54)

Answer

Appellants miss entirely the thrust of the District Court's decision. Unless injunction is granted, the Sale 40 project will proceed, and transportation and pipeline decisions will be made, further sums will be expended, commitments made, and irreversible steps taken *without* an accurate cost-benefit analysis which is essential to the determination of whether the project should proceed at all, and without adequate consideration of viable alternatives which might be preferable to Sale 40, and which might disclose some realistic course of action and decision-making with less risk of damage, with more potential for meeting the nation's energy needs more quickly and less costly than Sale 40. (Op. 91) (JA 114)

Appellants' implication that the defects in the Sale 40 EIS can be rectified by lifting the injunction and permitting the Secretary and lessees to proceed further with OCS activities subject only to the filing of a subsequent EIS on the production phase itself, forecloses any further consideration of the issue of whether the net value of the Sale 40 project warrants its continuance and forecloses any consideration of other options and priorities.

Furthermore, if the injunction is set aside, and the Secretary required simply to prepare a subsequent EIS as Appellants suggest, the momentum of Sale 40 activities will continue, further investments will be made in connection with equipment fabrication, construction of OCS related facilities, and development of real estate, and with inestimable and irretrievable physical impacts in the Mid-Atlantic Sale 40 region. An irresistible chain of events will be set in motion, giving Sale 40 lessees additional opportunity to oppose, on grounds of alleged "vested rights", any subsequent EIS which interferes with their oil trans-

portation decisions, or with their development and production plans.

In short, vacating the District Court's injunction will destroy the NEPA value of any subsequent EIS.

The District Court's decision to grant an injunction satisfies the tests applicable to a preliminary injunction noted in *New York v. NRC*, — F.2d — 9 ERC 1833, (2d Cir. 1977). As in the case at hand, the irreversible commitment of resources is cited as constituting such irreparable injury, and as making unlikely the modification of a project in the light of undesirable environmental consequences disclosed in an EIS.

"The denial of the right of the citizenry to have federal projects which affect the environment proceed only on the basis of 'a careful and informed decision-making process' was indeed found to provide sufficient irreparable injury to support the issuance of a preliminary injunction in *Scherr v. Volpe*, *supra*, at 1034; *Environmental Defense Fund v. Tennessee Valley Authority*, *supra*, at 1184; and *Izaak Walton League v. Schlesinger*, *supra*, at 295. Of course, when massive resources are committed to and are expended on a project without any forethought having been given to its environmental impact, modification of that project is unlikely despite the fact that undesirable environmental consequences are disclosed by the EIS when it is ultimately drafted. *Scherr v. Volpe*, *supra*, at 1034; *Environmental Defense Fund v. Tennessee Valley Authority*, *supra* at 1183-1184; *Izaak Walton League v. Schlesinger*, *supra*, at 294." (9 ERC at 1832-1833)

The appropriateness of the injunctive remedy granted by the District Court is even more pronounced given these facts. First, it was a permanent injunction issued after development of a comprehensive fact intensive record

after hearings and trial. Second, the District Court's decision held that the Secretary violated his NEPA duties with respect, not only to the need to adequately consider not only environmental impacts, but also cost-benefit, and alternatives.

In *Kleppe v. Sierra Club*, 427 U.S. 390 (1976), the Supreme Court found that an EIS's failure to adequately analyze the environmental impacts of, *and alternatives to*, the proposed project would be enough to justify enjoining a project. (49 L.Ed. 2d at 589, n. 16)

Injunction is the only appropriate remedy for insuring that the Secretary performs his fiduciary responsibility under both NEPA and the OCS Land Act for the public lands he holds in trust for all the people. To hold otherwise would be to give a green light to the Appellants to proceed further with irretrievable commitments which may preclude more desirable or less detrimental options and a cycle of incremental decision-making which it is NEPA's purpose to break. *NRDC v. NRC*, — F.2d —, 9 ERC 1149 (D.C. Cir. July 21, 1976) (*cert. granted*)

Finally, appellants' arguments against injunctive relief may also be rejected on the authority of *NRDC v. NRC*, 539 F.2d 284, 8 ERC 2069 (2d Cir. 1976) which held that the Nuclear Regulatory Commission violated NEPA by allowing interim commercial licensing of plutonium in light water nuclear reactors and interim licensing of nuclear fuel recycle activities, without completing its generic EIS on wide-scale use of uranium and plutonium mixed oxide fuel. The Court ruled that NRC had not fully addressed alternatives to the plutonium recycle industry, *NRDC v. NRC*, *supra*, 8 ERC (at 2069, 2070). The decision adversely affected the interests of corporations which had filed with the Nuclear Regulatory Commission applications to expand existing plants and to construct new multi-million dollar facilities essential to the different steps of the plutonium

recycle process. The nuclear power industry argued that delay in NRC plutonium licensing proceedings would cost industry millions of dollars (*Id.* at 2070)

The Second Circuit brushed these objections aside, again reaffirming that increased costs or delay was no justification for non-compliance with the procedural dictates of NEPA. The Court adopted the rationale that the NRC should avoid taking licensing steps that result in irretrievable commitments, foreclosure of alternatives, and preclusion of other options as refinement of the proposal progresses, or which could result in unnecessary grandfathering of existing facilities, or which would serve to tip the balance away from environmental concerns and prejudice the final agency decision (*Id.* at 2070, 2077-2079).

The Court emphasized its warning that it must consider the possibility that there are options often imperceptibly foreclosed by fragmented growth, and that commitments of resources already being made would curtail subsequent broad-scale assessment of alternatives (*Id.* at 2079).

Appellants' arguments in the case at bar clearly fall into the categories which the Second Circuit rejected as:

- 1) irretrievable commitments (e.g. OCS lessees' investments and physical impacts in preparation for OCS related activities);
- 2) foreclosure of alternatives, and preclusion of other options (e.g. the alternatives identified in the District Court's opinion and by Appellees' expert witnesses);
- 3) grandfathering of existing facilities (e.g. OCS lessees' claims of "vested rights" under their leases);
- 4) fragmented growth and incremental decision-making (e.g. Appellants' arguments that oil transportation, pipeline, and development and production decisions can be deferred and assessed in subsequent EIS's);
- 5) tipping the balance away from environmental concerns (e.g. Appellants' future investments which will

cite in the future, as in the past, as reasons for escaping injunctive relief to insure compliance of subsequent EIS's with NEPA.)

Conclusion

The outcome of this case will profoundly affect the seascape and landscape of the Mid-Atlantic region and its human and natural resources for the next quarter century.

The District Court has simply held that on the facts before it the Secretary did not live up to the high standards incumbent upon a fiduciary of public resources, accountable also under NEPA, and that injunctive relief is necessary to prevent irreversible consequences detrimental to the public interest.

This Court should affirm the painstakingly thorough decision of the trial court.

Respectfully submitted,

Appellee County of Suffolk
IRVING LIKE
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RICHARD C. HAND

Appendix "A"

GAS RESERVES REQUIRED IF DCS SALE #40 ACREAGE
IS TO PRODUCE AT LEVELS CONTAINED IN THE
INTERIOR DEPARTMENT'S PROGRAM DECISION
OPTION DOCUMENT, HIGH RESERVE CASE.

(DEPLETION SCHEDULE A) */

YEAR	TOTAL GAS PRODUCTION (BCF)	NEW RESERVES BROUGHT ON LINE (BCF)	CUMULATIVE RESERVES BROUGHT ON LINE (BCF)
1981	14.600000	309.322040	309.322040
1982	51.100000	541.968920	851.290950
1983	87.599999	342.418260	1193.709200
1984	226.300000	2632.447100	3826.156300
1985	365.000000	974.919850	4801.076100
1986	554.800000	3201.052600	8002.126700
1987	774.600000	2334.295600	10336.424000
1988	934.399990	1914.691900	12251.116000
1989	1124.200000	3131.023300	15382.139000

*/ See page 7 for the depletion schedule used
in developing this reserves estimate
(The page reference contained in this footnote and page references
contained in footnotes on succeeding pages are to this Appendix)

GAS RESERVES REQUIRED IF DCS SALE #40 ACREAGE
IS TO PRODUCE AT LEVELS CONTAINED IN THE
INTERIOR DEPARTMENT'S PROGRAM DECISION
OPTION DOCUMENT. HIGH RESERVE CASE.

(DEPLETION SCHEDULE B) */

YEAR	TOTAL GAS PRODUCTION (BCF)	NEW RESERVES BROUGHT ON LINE (BCF)	CUMULATIVE RESERVES BROUGHT ON LINE (BCF)
----	-----	-----	-----
1981	14.600000	175.903620	175.903620
1982	51.100000	439.759050	615.662670
1983	87.599999	439.759040	1055.421700
1984	226.300000	1675.323000	2730.744800
1985	365.000000	1692.277700	4423.022400
1986	554.800000	2336.551100	6759.573400
1987	774.600000	2759.559500	9519.133000
1988	934.399990	2143.297500	11662.430000
1989	1124.200000	2642.397500	14304.828000

*/ See page 8. "Reserves as of 12/31/70", for the depletion schedule used in developing this reserves estimate.

GAS RESERVES REQUIRED IF DDG SALE #40 ACREAGE
IS TO PRODUCE AT LEVELS CONTAINED IN THE
INTERIOR DEPARTMENT'S PROGRAM DECISION
OPTION DOCUMENT, HIGH RESERVE CASE.

(DEPLETION SCHEDULE C) */

YEAR	TOTAL GAS PRODUCTION (BCF)	NEW RESERVES BROUGHT ON LINE (BCF)	CUMULATIVE RESERVES BROUGHT ON LINE (BCF)
----	-----	-----	-----
1981	14.600000	292.000000	292.000000
1982	51.100000	438.000020	730.000020
1983	87.599999	350.400000	1080.400000
1984	226.300000	2569.600000	3650.000000
1985	365.000000	420.480120	4070.480100
1986	554.600000	4047.120000	8117.600100
1987	774.600000	1016.976480	9134.577000
1988	934.399990	3603.983600	12738.560000
1989	1124.200000	1367.772300	14106.332000

*/ See page 8, "Future Reserves Additions", for the
depletion schedule used in developing this estimate.

GAS RESERVES REQUIRED IF DOE CASE #40 PROPOSED
IS TO PRODUCE AT LEVELS CONTAINED IN THE
INTERIOR DEPARTMENT'S PROGRAM DECISION
OPTION DOCUMENT, HIGH RESERVE CASE.

(DEPLETION SCHEDULE A+) */

YEAR	TOTAL GAS PRODUCTION (BCF)	NEW RESERVES BROUGHT ON LINE (BCF)	CUMULATIVE RESERVES BROUGHT ON LINE (BCF)
----	-----	-----	-----
1981	14.600000	176.969700	176.969700
1982	51.100000	434.058410	611.028100
1983	87.599999	420.189060	1031.217100
1984	226.300000	1671.082700	2702.299800
1985	365.000000	1651.216300	4353.516100
1986	554.800000	2301.623200	6655.139300
1987	774.600000	2769.428300	9424.568000
1988	934.399990	2176.054900	11600.622000
1989	1124.200000	2752.172300	14352.795000

*/ See page 7 for the depletion schedule used in developing this reserves estimate. In this instance, it was assumed that 8.25 percent of the proved reserves would be produced in the first year (as opposed to 4.72 percent) and that the indicated production schedule would continue thereafter.

GAS RESERVES REQUIRED IF DCS SALE #40 ACPERAGE
IS TO PRODUCE AT LEVELS CONTAINED IN THE
INTERIOR DEPARTMENT'S PROGRAM DECISION
OPTION DOCUMENT, HIGH RESERVE CASE.

(DEPLETION SCHEDULE C+) */

YEAR	TOTAL GAS PRODUCTION (BCF)	NEW RESERVES BROUGHT ON LINE (BCF)	CUMULATIVE RESERVES BROUGHT ON LINE (BCF)
----	-----	-----	-----
1981	14.600000	146.000000	146.000000
1982	51.100000	379.600010	525.600010
1983	87.599999	417.560010	943.160010
1984	226.300000	1481.316000	2424.476000
1985	365.000000	1614.847700	4039.323700
1986	554.800000	2249.372400	6288.696100
1987	774.600000	2736.933700	9025.630000
1988	934.399990	2282.643500	11308.273000
1989	1124.200000	2683.265900	13991.539000

*/ See page 8, "Future Reserves Additions", for the depletion schedule used in developing this reserves estimate. In this instance, it was assumed that 10 percent of the reserves would be produced in the first year (as opposed to 5 percent) and that the indicated production schedule would continue thereafter.

FEDERAL POWER COMMISSION

BUREAU OF NATURAL GAS

DETERMINATION OF THE
FUTURE POTENTIAL GAS SUPPLY OF UNITED
APPLICABLE TO OFFSHORE LOUISIANA

Docket No. RP74-87

Investigation of Pennzoil Gas Company
United Gas Pipe Line Company Spin-off
and Related Transactions

WASHINGTON, D. C. 20426

October 25, 1974

Percentage of Average Gas Field Offshore Louisiana
Production as a Percent of Proved Reserves
Applicable to Future Reserve Additions */
Source: Form 15 1969-1971 Vintage Fields

<u>Year</u> <u>1/</u>	<u>Percent</u>
1	4.72
2	8.25
3	8.64
4	8.72 ✓
5	8.07
6	7.19
7	6.45
8	5.77
9	5.28
10	4.65
11	4.12
12	3.72
13	3.43
14	3.20
15	2.92
16	2.65
17	2.30
18	1.96
19	1.68
20	1.36

1/ Year of First Production.

*/ Testimony of FPC Staff Witness Edward H. Feinstein in
FPC Docket No. RP 74-87 (October, 1974).

See
Exhibit

PRODUCTION AS A PERCENT OF PROVED RESERVES */

Region 6-A

<u>Reserves as of 12/31/70</u>		<u>Future Reserve Additions*</u>	
<u>Year</u>	<u>Percent</u>	<u>Year</u>	<u>Percent</u>
		X**	0.0
1971	8.3	X+1	5.0
1972	8.3	2	10.0
1973	8.3	3	9.0
1974	8.1	4	8.0
1975	7.6	5	7.0
1976	7.0	6	7.0
1977	6.4	7	7.0
1978	5.8	8	6.7
1979	5.2	9	5.8
1980	4.7	10	5.0
1981	4.1	11	4.4
1982	3.7	12	3.8
1983	3.4	13	3.5
1984	3.0	14	3.0
1985	2.6	15	2.6
1986	2.3	16	2.4
1987	2.1	17	2.1
1988	1.8	18	1.9
1989	1.6	19	1.7
1990	1.4	20	1.5

Applies to both new additions in old fields and in new fields.

X = Year of reserve addition.

*/ Testimony of FPC Staff Witness Edward F. Feinstein in
FPC Docket No. RP 74-87 (October, 1974).

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

COUNTY OF SUFFOLK, et al.,

Appellees,

against

SECRETARY OF THE INTERIOR, et al.,

Appellants.

State of New York,
County of New York,
City of New York—ss.:

DAVID F. WILSON, being duly sworn, deposes
and says that he is over the age of 18 years. That on the 15th
day of April, 1977, he served two copies of
Brief of Plaintiff-Appellee Suffolk County on
George Burrell, Esq., the attorney
for Appellant National Ocean Industries Assoc.
by delivering to and leaving same with a proper person in charge of
his office at 220 Fifth Avenue
in the Borough of Manhattan, City of New York, between
the usual business hours of said day.

David F. Wilson

Sworn to before me this

15th day of April, 1977.

Courtney J. Brown

COURTNEY J. BROWN
Notary Public, State of New York
No. 31-5472920
Qualified in New York County
Commission Expires March 30, 1978

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

COUNTY OF SUFFOLK, et al.,

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Brief of Plaintiff-Appellee Suffolk County on
See attached list

the attorney s for ~~the~~ see attached list
by depositing the same, properly enclosed in a securely sealed
post-paid wrapper, in a Branch Post Office regularly maintained
by the Government of the United States at 90 Church Street, Borough
of Manhattan, City of New York, directed to said attorney s at
No. See attached list () N. Y.,
that being the address designated by the m for that purpose upon
the preceding papers in this action.

David F. Wilson
.....

Sworn to before me this

15th day of April, 1977.

Courtney J. Brown
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Notary Public, State of New York
No. 31-5472920
Qualified in New York County
Commission Expires March 30, 1978

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